REPORT

ON

ADMINISTRATION OF ESTATES OF DECEASED PERSONS

ONTARIO LAW REFORM COMMISSION

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ONTARIO LAW REFORM COMMISSION

1991

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

The Commission's office is located on the Eleventh Floor at 720 Bay Street, Toronto, Ontario, Canada, M5G 2K1.

The Commission wishes to acknowledge the contribution of the former members of the Commission who considered many of the issues discussed in this report during their tenure at the Commission: Justice Derek Mendes da Costa, H. Allan Leal, Q.C., the late Richard A. Bell, William R. Poole, Q.C., and Barry A. Percival, Q.C.

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Ontario
Law Reform
Commission

The Honourable Howard Hampton
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on Administration of Estates of Deceased Persons*.

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Chair

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Vice Chair

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Commissioner

March 12, 1991

CHAPTER 1

INTRODUCTION

It is important that the law governing the administration of the estates of deceased persons be rational, clear and accessible. It is an area of the law that affects all of us. Moreover, it is one in which individuals may play a critical role in relation to both the living and the dead. People often appoint their closest family members or friends as their executors; where no executor is appointed in a will, or where the person named in the will is not willing or able to act as executor, courts generally appoint family members as administrators of the deceased's estate. In many cases, the persons who are appointed executors or who apply to be appointed administrators of the estate are laypersons, whose experience may not prepare them for this important responsibility, and who risk liability should they be found later to have failed to discharge it properly.

However, the law governing the administration of estates of deceased persons is often difficult, uncertain, and obscure. It demands rationalization and modernization. The statutory law is inconveniently located in three main statutes—the *Estates Act* (formerly the *Surrogate Courts Act*),[1] the *Trustee Act*,[2] and the *Estates Administration Act*.[3] Much of the case law remains dominated by English precedents and, because of this, Ontario practitioners often must have recourse to English, as well as Ontario, texts in many areas.[4]

Our concern in this report is with estates administration: collecting the deceased's assets, paying her debts, and managing any remaining assets until they are distributed to the persons entitled. We are not here dealing with the law governing how property is to be divided among the deceased's family;[5] nor do we deal with the requirements for the making of a valid will.[6]

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[1] R.S.O. 1980, c. 491.

[2] R.S.O. 1980, c. 512.

[3] R.S.O. 1980, c. 143.

[4] The leading Ontario texts are Hull and Cullity, *Macdonell, Sheard and Hull on Probate Practice* (3rd ed., 1981), and Baker, *Widdifield on Executors' Accounts* (5th ed., 1967). The leading English text is Sunnucks, Martyn and Garnett, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (1982).

[5] Part II of the *Succession Law Reform Act*, R.S.O. 1980, c. 488, specifies how property is to be divided where a person dies intestate.

[6] Part I of the *Succession Law Reform Act* sets out the requirements for making a valid will. A will need not be drawn by a lawyer and signed formally in the presence of witnesses. A person may make a valid will in her own handwriting without witnesses being involved (s. 6).

In this report, we discuss a number of topics and a great many issues. In chapter 2, we examine the office of personal representative in some detail. We discuss appointment to the office, the powers and duties of personal representatives, their responsibility and liability to others, compensation and reimbursement, and suspension and termination of the office. In chapter 3, we consider the identification of beneficiaries—in particular, the rules governing proof of survivorship, proof of death in the case of missing beneficiaries, and unascertained beneficiaries—and several miscellaneous rules respecting bequests and devises.

In chapter 4, we examine a number of the substantive and procedural issues respecting creditors and other claimants. We consider the administration of both insolvent and solvent estates. We also discuss the requirement of advertising for creditors, and the procedures available for the processing of claims against the estate. Finally, we review certain miscellaneous issues, namely, contingent liabilities, evidence in actions involving estates, bonding of estate trustees, and the availability of the exemptions under the *Execution Act*.[7]

Chapter 5 deals with the vesting in personal representatives of both personal and real property and their power of sale in relation to that property. With respect to real property, we closely examine the provisions of the *Estates Administration Act*. We also deal with the distribution of personal and real property to beneficiaries.

Chapter 6 addresses several discrete issues relating to the role of the Ontario Court (General Division) in estates administration, including the passing of accounts and the function of the court as a depository for wills.

Our recommendations are summarized at the end of this report.

There are two fundamental policy directions in this report. First, we take the view that, generally, the position of personal representatives should be assimilated to that of ordinary trustees and that, except with respect to the initial appointment to the office, many of the recommendations made by the Commission in the *Report on the Law of Trusts* should apply to personal representatives.[8] Thus, personal representatives should have the same administrative powers as trustees, and should be subject to the same rules governing transmission of their office, liability to others, compensation for their efforts, and suspension and termination of their office. In furtherance of our recommendation to assimilate the office of personal representative to that of a trustee, we recommend that a new term should be used to

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[7] R.S.O. 1980, c. 146.

[8] The project on the administration of estates of deceased persons had its origins in the Commission's law of trusts project, which culminated in the publication of the *Report on the Law of Trusts* in 1984. Originally, a consideration of the law governing the administration of estates of deceased persons had formed part of that project. However, the Commission concluded that it should constitute a separate project.

signify this change. Whether appointed by the will or the court, personal representatives are to be called "estate trustees".

Throughout this report, we use the term "estate trustee" to describe a person who is to administer an estate under the new regime that we have recommended. When we discuss the present law in Ontario, we continue to use the familiar terms "personal representative", "executor", and "administrator".

The second major direction to our recommendations is that we favour removing the difference in the way that the present law treats real property and personal property. For historical reasons, very different rules govern the sale of real property and personal property and the order in which real property and personal property are applied to meet the liabilities of a solvent estate. There is no principled justification for maintaining these differences. In this report, we propose that there should no longer be any distinction in the way that personalty and realty are treated by the law.

Earlier, we noted that the present statutory law governing the administration of estates is found in three statutes. Requiring personal representatives, through their advisors, to consult three sources to ascertain the basic principles governing the discharge of their duties is inconsistent with the principle of accessibility to which the law should aspire. In our view, all legislation bearing directly upon the administration of estates of deceased persons—the *Estates Act*, the relevant provisions of the *Trustee Act*, and the *Estates Administration Act*—should be consolidated in a single statute. This statute, moreover, should provide that the rules governing ordinary trustees should apply to estate trustees in accordance with the recommendations in this report.

It is important to emphasize that the Commission's recommendations are not intended to constitute a complete codification of the law governing the administration of estates of deceased persons. Rather, they respond to problems in the law that, in our view, are critical and need legislative reform.

The initial Project Director was Professor George W. Alexandrowicz, of the Faculty of Law, Queen's University. Background research papers were prepared by the Research Team, which was comprised of the following individuals: Professor C.T. Asplund, of the Faculty of Law, Queen's University; Professor Marvin G. Baer, of the Faculty of Law, Queen's University; Professor Peter Hogg, of Osgoode Hall Law School, York University; Professor H.R.S. Ryan, of the Faculty of Law, Queen's University; Professor Judith Swan, of the Faculty of Law, Queen's University; and Professor Timothy Youdan, then of the Faculty of Law, University of Western Ontario. Professor Alexandrowicz also prepared a research paper. We wish to acknowledge, with appreciation, the important contribution of the Research Team.

Consultation with recognized experts in a field is invaluable for law reform. In the early stages of the project, the Commission was ably assisted by an Advisory Board. Its Chair was Mr. Malcolm S. Archibald, Q.C. The members of the Advisory Board were the following: Mr. J.E.C. Beatty, Q.C.;

Mr. C.E. Bennett, Q.C.; Ms. Donna C. Cappon; Madam Justice Sidney Dymond; Mr. David G. Fuller; Professor Ralph E. Scane, Q.C., of the Faculty of Law, University of Toronto; and Mr. James J. Wardlaw, Q.C. The Commission relied heavily on their advice in formulating its recommendations for reform.

In 1985, direction of this project was assumed by Mr. Larry M. Fox, our Senior Counsel, who is primarily responsible for bringing this project to fruition and for writing this report. Chapter 4 was written by Mr. J.J. Morrison, one of the Commission's counsel. Chapter 5 was written by Professor Timothy Youdan, of Osgoode Hall Law School, York University, with the collaboration of Mr. Fox. Mr. M.A. Springman, General Counsel and Director of Research, assisted with the preparation of the final report. We wish to express our gratitude to all of these people for their contribution to the completion of this very difficult project.

We also wish to acknowledge, with thanks, the dedication of Ms. M. Patricia Richardson, the Commission's former General Counsel and Director of Research, whose participation was critical in the early stages of the project.

We wish to express our gratitude to the Chief Justice of Saskatchewan, the Hon. Edward D. Bayda, who as Visiting Scholar with the Commission, assisted us greatly in our deliberations.

In the course of preparing the final draft of this report, members of the Commission's legal staff consulted with members of the Bench and Bar and other interested persons. We wish to acknowledge, in particular, the contribution of Professor Youdan, upon whose prodigious knowledge and wise counsel we relied considerably in completing this report. We also wish to thank Ms. H. Lenore Roszell, who gave generously of her expertise and time in consulting with Mr. Morrison in the preparation of chapter 4. Certain important consultative meetings were arranged with the co-operation of the executive of the Wills and Trusts Subsection of the Canadian Bar Association—Ontario, for whose assistance we are grateful.

We wish to thank the following individuals for their assistance in various stages of the project: Mr. Malcolm S. Archibald, Q.C.; Ms. Anne E.P. Armstrong; Ms. Donna C. Cappon; Mr. Howard M. Carr; Mr. Barry S. Corbin; Mr. Maurice C. Cullity, Q.C.; Madam Justice S. Dymond; Mr. David G. Fuller; Madam Justice P. R. German; Mr. Wolfe D. Goodman, Q.C.; Madam Justice D.J. Haley; Mr. Alfred C. Heakes, Q.C.; Mr. Strachan Heighington, Q.C.; Mr. Rodney Hull, Q.C.; Ms. P. Ann Lalonde, Counsel, Office of the Official Guardian; Ms. Barbara E. LeVasseur, Deputy Director, Property Law Branch, Ministry of Consumer and Commercial Relations; Mr. Norman B. Lipson; Mr. John Marshall, Q.C.; Mr. Willson A. McTavish, Q.C., Official Guardian; Mr. Robert I. Morrison; Ms. Margaret R. O'Sullivan; Mr. Paul Reynolds, C.A., Accountant, Office of the Public Trustee; Professor Ralph E. Scane, Q.C.; Mr. Brian A. Schnurr; Mr. Justice J.D. Sheard; Mr. James Stanley, National Trust; and Mr. James J. Wardlaw, Q.C.

CHAPTER 2

THE OFFICE OF PERSONAL REPRESENTATIVE: THE ESTATE TRUSTEE

1. THE NATURE OF THE OFFICE

(a) Introduction

In Ontario, personal representatives bear responsibility for the administration of the estates of deceased persons. It is the function of a personal representative to deal with the administration of the assets of the deceased and to act, in a real sense, as the *alter ego* of the deceased. Put simply, this involves "getting in" the estate of the deceased—that is, collecting its assets—paying the debts of the deceased, and managing any remaining assets until the personal representative distributes them in accordance with the will of the deceased or, if there is no will, according to the law governing intestacy.

There are two general kinds of personal representative, which are distinguishable primarily by the manner of their appointment. A personal representative may be appointed by the will of the deceased or appointed by the court. Where appointed by a will, the personal representative is called an "executor". The authority of the executor is derived from the will, and exists from the date of death. In Ontario, evidence of this authority is provided by letters probate issued by the Ontario Court (General Division), which certify that the will has been duly proved and registered in the court, and confirm that the administration of the property of the testator has been committed to the executor or executors named in the will.[1]

Where the personal representative is appointed by the court, rather than named in the will, the representative is known as an "administrator". There are several types of administrator. If the deceased has died intestate, the personal representative is known simply as "the administrator" of his estate. If the deceased has left a will, but no person has been named as executor, or if the person who has been appointed executor is dead, incapacitated, disqualified or refuses to act, or if the appropriate court

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[1] A testator may appoint a person as executor for his entire estate without any reservation, or may appoint a person subject to a qualification, for example, respecting the duration of his office or the property that he is to administer: Hull and Cullity, *Macdonell, Sheard and Hull on Probate Practice* (3rd ed., 1981), at 161-62.

considers that he should not act, the duty to appoint a personal representative devolves upon the court. A person appointed in one of these circumstances is called an "administrator with the will annexed". The authority of an administrator and an administrator with the will annexed arises from the grant of administration by the Ontario Court (General Division), evidence of which is known as letters of administration and letters of administration with will annexed, respectively.[2]

Personal representatives resemble trustees. There is no generally accepted definition of "trust" or "trustee" that can comprehend the myriad uses that may be made of the trust concept. In the 1984 *Report on the Law of Trusts*,[3] the Commission offered the following general explanation: a trust exists where one person—"the trustee"—holds legal title to property, while another person—"the beneficiary"—has equitable title or, in other words, the right to enjoy that property. Generally, trusts may arise in one of two ways: either by words or acts, a person may evince an intention to create a trust, or the law may impose a trust to ensure that a person is able to enjoy the property that has been made subject to the trust. Trusts may be created by a person to come into effect during her lifetime or to become operative upon her death. Trustees are subject to certain duties, and may exercise a number of powers, matters that we discussed at considerable length in the Trusts Report. These duties and powers pertain to the manner in which trustees must discharge their basic responsibility to hold the trust property for the benefit of the beneficiaries.

Even though executors and administrators have identical responsibilities in connection with the administration of estates, the law governing the two offices is not identical. In certain instances, distinctions are drawn between them that cannot be functionally justified. Similarly, even though personal representatives and trustees are both fiduciaries—that is, persons charged with duties and given powers for the benefit of others—in some cases there is uncertainty whether the same principles are applicable to the two offices and in other cases the law clearly does distinguish between them. Yet in many of these cases, it would seem logical, in our view, for the same principles to apply.

We do not wish to suggest, however, that all the distinctions between executors and administrators and between personal representatives and trustees are insupportable. Certain distinctions between executors and administrators simply reflect the differences in the way that persons are appointed to the offices. There are distinctions between personal representatives and trustees that mirror the basic difference in the responsibilities of the two offices.

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[2] There are a variety of limited grants of administration that may be granted by a court, under which administration of less than the entire estate may be granted to an administrator: see Hull and Cullity, *ibid.*, at 261-79.

[3] Ontario Law Reform Commission, *Report on the Law of Trusts* (1984) (hereinafter referred to as "Trusts Report").

Because the present law governing the office of the personal representative has been shaped by the origins of the office and its subsequent evolution, we need to begin with a sketch of the historical background. We shall then examine the contemporary state of the office and, in particular, its relationship to the office of the trustee.

(b) Historical Background

(i) England

The offices of the executor and the administrator are of ancient origin, their introduction predating the development of the modern trust by the Court of Chancery. Although the office of the personal representative appeared before the office of trustee, it was the law governing trusts that further refined it.

In the period following the Norman conquest, the office of executor first appeared in an embryonic form within the ecclesiastical courts, which then had exclusive jurisdiction over probate and matters relating to the making, revocation, and interpretation of wills.[4] Gradually, the executor became the main testamentary representative of the deceased.The office of executor received early recognition from the common law courts, which contributed to the fashioning of its powers and responsibilities.[5] During the medieval period, the office had assumed the basic features that would characterize it until major legislative changes were effected in the nineteenth and twentieth centuries.[6] Further shaping of the office occurred when the Chancellor, who had begun to administer Equity, became engaged in the supervision of personal representatives, and later, trustees.

The office of administrator had its origins in the administration of the goods of the deceased under the auspices of the ecclesiastical courts. Where a person died intestate or without having appointed an executor, his goods vested in a church official, known as the "ordinary", whose responsibility was to administer them. The ordinary was not "a true representative"[7] of the deceased, for originally he could not sue or be sued in the place of the deceased. In 1285, a statute made the ordinary liable to be sued as if he

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[4] Indeed, ecclesiastical courts exercised testamentary jurisdiction in England until 1857, when the Court of Probate was created.

[5] Holdsworth, *A History of English Law*, Vol. III (5th ed. 1942, Rep. 1966), at 585-91.

[6] The executor was appointed by the will, either expressly or implicitly. The executor could sue in the common law courts in debt, detinue, and covenant. The chattels of the deceased were vested in the executor. The office of the executor was transmissible to the executor of the executor. See, generally, Holdsworth, *supra*, note 5, at 563-66 and 576-85.

[7] *Ibid.*, at 568.

were an executor.[8] The practice of the ordinary was to appoint others to administer the goods of the deceased as his delegates.

The enactment of a 1357 statute was critical to the development of the office of administrator.[9] This statute required the ordinary to appoint a person or persons to perform the work of administration "from the next and most lawful friends of the deceased person intestate". The administrator thus became an official in his own right, and ceased to be a mere delegate of the ordinary. In addition, this statute gave administrators the right to bring actions for debts owed to the deceased, and required them to account to the ordinaries. With these changes, the administrator became a representative of the deceased.[10] In many respects, the office of administrator had begun to resemble that of executor.

With the evolution of the Court of Chancery and the development of the principles of Equity—particularly in their application to trusts—the office of personal representative came under an influence that would shape it profoundly.

The Court of Chancery became involved in the supervision of executors and administrators because creditors and beneficiaries were dissatisfied with the inadequacy of the remedies available from the ecclesiastical courts and common law courts. They therefore sought relief from the Court of Chancery. The Court of Chancery was an attractive forum, as it had already developed efficient procedures for discovery and accounting, and had a variety of effective remedies at its disposal. Eventually, the Court of Chancery assumed a large measure of control over personal representatives. In choosing rules respecting the powers, duties, and liabilities of personal representatives, the Court of Chancery turned to the principles that it had developed, and was continuing to refine, in supervising the conduct of trustees. Increasingly, the position of personal representatives came to resemble that of trustees.[11]

While the details of the law governing personal representatives continued to be developed in the courts, important changes in England were effected by legislation. Beginning in 1847, a series of statutes addressed the administration of trusts, including testamentary trusts, and had an important

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[8] *Statute of Westminster the Second* (1285), 13 Ed. I, st. I, c. 19 *(Intestate's Debts)* (U.K.).

[9] *Statute of Westminster* (1357), 31 Ed. III, st. I, c. 11 (*Administration on Intestacy*). See Holdsworth, *supra*, note 5, at 568-69.

[10] *Ibid.*

[11] The discussion in this paragraph and the preceding paragraph draws on Holdsworth, *supra*, note 5, at 594-95, Vol. V (3d ed., 1945, Rep. 1966), at 288-89, and 316-30, and Vol. VI (2nd ed., 1937, Rep. 1966), at 652-57.

impact on estates administration.[12] Several statutes dealt with the powers of executors.[13] In 1888 and 1893, much of the previous legislation relating to executors and administrators, as well as to trustees, was consolidated in trustee statutes.[14] In England, the important statutes are the *Trustee Act 1925*,[15] which consolidated the previous law and also made some amendments, and the *Administration of Estates Act, 1925*.[16]

(ii) Ontario

English law was introduced in the first statute passed by the legislature of the newly-formed province of Upper Canada.[17] However, until the creation of the Court of Chancery in 1837,[18] courts were unable to apply equitable doctrines, for there was no court of equity in Upper Canada. In 1793, the Court of Probate was established in conjunction with surrogate courts in each district of the province;[19] the responsibility of the courts was to grant probate and administration. There were never ecclesiastical courts in Ontario.[20]

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[12] *An Act for better securing Trust Funds and for the Relief of Trustees* (1847), 10 & 11 Vict., c. 96 (U.K.). This Act was amended in 1849, by 12 & 13 Vict., c. 74 (U.K.) and in 1852, by 15 & 16 Vict., c. 55 (U.K.). Trustees were authorized to pay money into court, or transfer certain securities to the credit of the Accountant-General, to the credit of the trust. The *Trustee Act 1850*, 13 & 14 Vict., c. 60 (U.K.) authorized the Chancellor, *inter alia*, to vest trust assets held by infants or "lunatic" trustees or personal representatives in new trustees.

[13] See, for example, *An Act to further amend the Law of Property and to relieve Trustees* (1859), 22 & 23 Vict., c. 35 (U.K.), commonly known as *Lord St. Leonard's Act* (which enacted enabling provisions concerning trustee investment powers); *An Act to give to Trustees, Mortgagees, and others certain Powers now commonly inserted in Settlements, Mortgages and Wills* (1860), 23 & 24 Vict., c. 145 (U.K.), commonly known as *Lord Cranworth's Act, 1860* (which enacted enabling provisions concerning appointment and discharge of trustees); and *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict., c. 41 (U.K.).

[14] *Trustee Act, 1888*, 51 & 52 Vict., c. 59 (U.K.), and *Trustee Act, 1893*, 56 & 57 Vict., c. 53 (U.K.).

[15] 15 & 16 Geo. 5, c. 19 (U.K.).

[16] 15 & 16 Geo. 5, c. 23 (U.K.). Legislation enacted since these two statutes—for example, the *Administration of Estates Act 1971*, c. 25, and *Inheritance (Provision for Family and Dependents) Act 1975*, c. 63—has had a relatively minor impact on the nature of the office of personal representative.

[17] *An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, entitled, "An Act for making more effectual Provision for the Government of the Province of Quebec, in North America, and to introduce the English Law as the Rule of Decision in all matters of Controversy, relative to Property and Civil Rights"* (1792), 32 Geo. 3, c. 1. See, now, *Property and Civil Rights Act*, R.S.O. 1980, c. 395.

[18] *An Act to Establish a Court of Chancery in this Province* (1837), 7 Will. 4, c. 2.

[19] *An Act to establish a Court of Probate in this Province, and also a Surrogate Court in every District thereof*, 33 Geo. 3, c. 8.

[20] For a good discussion of the history of courts in Ontario, see Zuber, *Report of the Ontario Courts Inquiry* (1987), at 8-28.

The inherited body of common law and equity was soon altered by local legislation. Statutes enacted in 1834,[21] 1837,[22] and 1838[23] gave executors the powers that were already conferred on executors by legislation in England. In 1851, additional powers were given to executors.[24] In 1873, legislation gave the Attorney General authority to take out letters of administration of the estates of intestates who left no known next-of-kin in the province, and conferred a power to sell real estate.[25]

In 1877, the piecemeal legislation that had been enacted was consolidated as part of the first revision of Ontario statutes.[26] This Act also extended certain powers and declared certain rights and liabilities of personal representatives.[27]

Since this revision, there have been several legislative changes affecting the administration of estates. Statutes like *The Devolution of Estates Act, 1886*,[28] *The Dependants' Relief Act, 1929*,[29] *The Succession Law Reform Act, 1977*,[30] and more recently, the *Family Law Act, 1986*,[31] were important milestones, which affected the discharge of duties and the exercise of powers of personal representatives.

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[21] *An Act to amend the Law in relation to the jurisdiction and procedure of the several Surrogate Courts in Upper Canada, and to simplify and expedite the proceedings in such Courts, 1858*, 22 Vict., c. 93 (Can.).

[22] *An Act to amend the Law respecting Real Property, and to render the proceedings for recovering the possession thereof in certain cases, less difficult and expensive, 1834*, 4 Wm. 4, c. 1 (Ont.).

[23] *An Act to amend the law with respect to the liability of legal Representatives of Joint Contractors, and Defendants on Joint Judgments, 1858*, 1 Vict., c. 7 (Ont.).

[24] *An Act to amend the Heir and Devisee Act, 1851*, 15 Vict., c. 12 (Can.).

[25] *An Act respecting the Administration of Estates of Intestates, in which the Crown is interested, 1873*, 36 Vict., c. 21 (Ont.).

[26] *An Act respecting Trustees and Executors and the Administration of Estates*, R.S.O. 1877, c. 107.

[27] Powers of investment were extended. Executors gained the power to exercise a power of sale of land when no person was named in the will for the purpose, including the power to raise money by sale or mortgage when land was charged with payments of debts and legacies, and the power to convey pursuant to a contract made by the testator. Personal representatives were authorized to pay debts and compromise claims without the authority of the Court, and to pay and distribute after advertising for creditors and other claims. They could give notice of contestation of a claim, which would be barred unless action was commenced within six months after receipt of notice by the claimant.

[28] S.O. 1886, c. 22. See, now, *Estates Administration Act*, R.S.O. 1980, c. 143.

[29] S.O. 1929, c. 47. See, now, *Succession Law Reform Act*, R.S.O. 1980, c. 488.

[30] S.O. 1977, c. 40. See, now, *Succession Law Reform Act*, *supra*, note 29.

[31] S.O. 1986, c. 4.

(c) The Case for Reform

We have earlier indicated that the present Ontario law draws certain distinctions between administrators and executors and between personal representatives and trustees. While certain of these distinctions reflect functional differences, others are simply historical anomalies. It is our view that, as a matter of general principle, distinctions of the latter variety have no place in a modern system of law.

We believe that the current state of the law respecting the persons responsible for estate administration is a matter of concern not simply for reasons of consistency or doctrinal purity. There is a price to be paid for tolerating the existence of different rules applicable to persons who are performing similar functions. While this problem is particularly obvious in comparing executors and administrators, whose functions are virtually identical, it also arises in comparing personal representatives and trustees.

In this section, we shall review how the present law treats the offices involved in estate administration, with particular emphasis placed on the various distinctions to which we have alluded. We shall first consider executors and administrators.

While the distinctions between the offices of executor and administrator have existed since the medieval period, their functions have become identical. The process of assimilating the office of administrator to that of the executor, which was undertaken initially by the common law and Court of Chancery, has been continued in the *Trustee Act*[32] and the *Estates Administration Act*.[33]

Notwithstanding similar treatment under the existing law and the identity of functions, several distinctions between the offices remain. Certain distinctions relate to the method of appointment. An executor derives his title and authority from the will, which has effect or "speaks" from the time of death. The grant of letters probate by the court merely confirms that the will has been duly proved and registered, and that the administration of the property of the testator has been duly committed to the named executors. The acts of the executor with respect to real property do not require probate and, with respect to personal property, those acts done before probate are ratified by the grant.

An administrator, on the other hand, derives his authority from the grant of letters of administration by the court. Before the grant, his acts are generally invalid, although they may be rendered valid in appropriate circumstances through the operation of "the doctrine of relation back".

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[32] R.S.O. 1980, c. 512.

[33] *Supra*, note 28.

Under this judicial doctrine, acts done prior to the grant may be rendered valid if they were done for the benefit of the estate or for "the purpose of protecting or preserving the estate from wrongful injury".[34]

Different rules govern appointment to the offices. Any person may be named as executor by a testator, while the persons to whom administration may be granted is governed by the *Estates Act*.[35] Under the Act, a non-resident may be granted letters probate,[36] but may not be granted letters of administration.[37] However, letters probate or letters of administration granted by a court of competent jurisdiction in another province or territory of Canada, the United Kingdom, or "in any British possession" may be resealed by the court, which gives them the force and effect they would have had if granted in Ontario by an Ontario court.[38]

On the grant of administration, except where the administrator is a trust company incorporated under the *Loan and Trust Corporations Act, 1987*,[39] the *Estates Act* requires an administrator to give the court a bond conditioned on the due performance of his duties.[40] A similar requirement is not imposed on executors, except in the case of non-residents.[41]

The offices differ in the extent to which they are transmissible. As we shall explain shortly, in some circumstances the office of executor may be transmitted to a subsequent executor without the necessity of a second grant of probate. By contrast, the office of administrator is not transmissible, except in very narrow situations.[42]

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[34] Hull and Cullity, *supra*, note 1, at 211. See, also, rules of court, O. Reg. 560/84, r. 9.03(1), which deals with actions brought by or against a person before a grant of probate or administration. Formerly, the rules of court were known as the "Rules of Civil Procedure". This was changed in 1989: *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 160a, as en. by S.O. 1989, c. 55, s. 31.

[35] R.S.O. 1980, c. 491, s. 54. Formerly, this statute was known as the "*Surrogate Courts Act*"; its title was changed by the *Court Reform Statute Law Amendment Act, 1989*, S.O. 1989, c. 56, s. 48(25).

[36] *Estates Act*, *supra*, note 35, s. 24.

[37] *Ibid.*, s. 24. But see s. 61(2), *ibid.*, which provides that a bond is not required where the administration on an intestacy is granted to a surviving spouse and where the following 2 conditions are met: the net value of the estate, as computed for the purposes of s. 45 of the *Succession Law Reform Act*, *supra*, note 29, does not exceed $75,000; and an affidavit is filed with the application for administration setting forth the debts of the estate.

[38] *Ibid.*, s. 77.

[39] S.O. 1987, c. 33, s. 175(4).

[40] *Estates Act*, *supra*, note 35, s. 60, as am. by S.O. 1989, c. 56, s. 48(19). This also applies to a grant of administration with the will annexed.

[41] *Ibid.*, s. 25.

[42] See discussion, *infra*, this ch., sec. 2 (c).

We now turn to compare personal representatives and trustees under present Ontario law.

For the most part, the position of personal representatives has been assimilated to that of trustees. The similarities in the applicable law can be explained in part by the historical development that we have traced—in particular, the supervision of both offices by the Court of Chancery—and in part by the *Estates Administration Act* and the *Trustee Act*, which equate them for many purposes. Nonetheless, under the present law, certain significant distinctions between personal representatives and trustees continue. Moreover, in relation to a number of issues, there is a degree of uncertainty whether the same principles apply to both offices.

Before turning to compare the position of personal representatives and trustees under the present law, we should recall their respective responsibilities, as this is the background against which the appropriateness of the law should be evaluated. Put very simply, to the extent the offices fulfil the same role, it would appear logical and desirable that the same rules should apply; distinctions in the law should be based on functional differences.

There is a basic difference in responsibility between the personal representatives and trustees. It is the task of the personal representative to collect the assets of the deceased, to pay funeral and testamentary expenses and debts, and to distribute the remainder of the estate among the persons entitled under the law. In discharging this role, personal representatives serve as the *alter ego* of decedents: they succeed to their heritable estates, and to the unsatisfied rights and the obligations and liabilities that survive death. Their duty is to enforce the rights of decedents and to satisfy the debts from the estate. In summary, the role of personal representatives is a limited one, circumscribed by the fundamental responsibility to wind up the affairs of decedents and distribute their estates among those entitled.

While, as we have indicated, a range of diverse functions may be carried out by trusts, for purposes of comparison, it is most useful to refer to the what may be called the "typical" family trust. Professor Donovan Waters states that a trust is "a means whereby property can be enjoyed by a succession of persons over a period of time",[43] and this description is apt in the case of family trusts. Not only does the purpose of the trust obviously affect the duration of the office, but it also has important implications for the performance by a trustee of his duties. Trustees must often take a long-range view of the interests of the various persons for whose benefit the trust has been created. While both trustees and personal representatives are given the property for which they are responsible, trustees bear no responsibility for collecting property that is analogous to the obligation of personal representatives to get in the assets of the estate.

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[43] Waters, *Law of Trusts in Canada* (2d ed.,1984), at 36.

Despite this fundamental difference between the two offices, there are substantial similarities. The most important of these is that both personal representatives and trustees are fiduciaries, who must perform their duties and exercise their powers for the good of others. Moreover, certain of their specific duties and powers are similar, however different the general context in which they exist.

Legislation has emphasized the similarity of trustees and personal representatives. Section 2 of the *Estates Administration Act* provides that "[a]ll real and personal property . . . devolves to and becomes vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto". Section 1(q) of the *Trustee Act* states that the term "trust" "extends to and includes the duties incident to the office of personal representative", and gives "trustee" a corresponding meaning. While the legislation might seem to equate the two offices, the situation is not as clear as the statutory language would suggest.[44] It is not entirely clear whether personal representatives enjoy all the powers and rights conferred on "trustees" by the *Trustee Act*; it remains to be seen whether courts will give the definition of "trustee" this interpretation.[45]

The *Trustee Act* also differentiates between the two offices in certain cases. Special provisions of the *Trustee Act* apply only to personal representatives and the administration of estates.[46] Section 2 of the Act, which deals with retirement of trustees, does not apply to executors or administrators. As a result, a personal representative may not retire, in effect retaining his office for life, unless removed by the court.[47]

An important unresolved issue in Ontario is whether the actions of a single personal representative bind the estate and his fellow personal representatives or whether all the personal representatives must act jointly to have such a legal effect.[48]

We observe that Professor Waters has concluded that "[s]tatute in Canada may well have brought closely together the legal positions of the personal representative and the trustee, but the differences that may still

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[44] Compare *Re Wilson*, [1952] O.W.N. 101 (H.C.J.), with *Re Thompson*, [1955] O.W.N. 521 and *Re Baty*, [1959] O.R. 13, 16 D.L.R. (2d) 164 (C.A.). For a discussion, see Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), at 55.

[45] For example, Waters, *supra*, note 43, at 39, states that "[a]t this point it is a question whether the *Trustee Act* powers, as opposed to duties, extend to personal representatives".

[46] *Supra*, note 32, ss. 45-59.

[47] *Re McLean* (1982), 37 O.R. (2d) 164, 135 D.L.R. (3d) 667 (H.C.J.) (subsequent reference is to 37 O.R. (2d)).

[48] Waters, *supra*, note 43, at 41-42.

exist are not inconsequential, and the subject is in need of statutory clarification".[49]

To the extent that different principles apply to personal representatives and trustees, or that there is uncertainty whether the same principles apply, confusion may ensue. This danger is particularly likely in the relatively common situation of a will that has appointed the same person as an executor and a trustee. At a certain stage, the administration of the estate will be completed, and the person appointed executor will assume the role of trustee and become responsible for the administration of the trusts established under the will. Having different principles apply to the same person who is occupying two very similar, yet distinct, offices is obviously complex. What heightens the problem for the person who is both executor and trustee, and for her legal advisors, is that it is often difficult to determine when the administration of the estate is complete and the trust commences. Thus, to the extent that different principles of law govern trustees, it cannot be stated with certainty when they apply.

(d) Recommendations—A New Office of "Estate Trustee"

We have concluded that the present law in Ontario regarding the office of the personal representative is unsatisfactory. The precise nature of the office is unclear. While, as a consequence of the legislation, personal representatives resemble trustees, the relationship between the two concepts remains uncertain and confused.

Independent of our concern about this uncertainty, we believe that the complexity of the present law of estates administration that is attributable to the distinctions drawn between personal representatives and trustees, and between administrators and executors, is unjustifiable and inimical to a rational and efficient system of law.

Legislation should be enacted to clarify the exact nature of the office of personal representative. Specifically, in light of the similarity of the basic fiduciary responsibility of personal representatives and trustees, we recommend that the office of the personal representative should be generally assimilated to that of a trustee, in accordance with the recommendations in this chapter.[50] We further recommend that, since the personal representative has special rights, duties, and powers as the *alter ego* of the deceased in

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[49] *Ibid.*, at 42.

[50] Waters, *supra*, note 43, at 42, states as follows:

> [I]t may be possible to go further, and say that the powers as well as the duties of personal representatives and trustees ought to be the same, save where statute expressly withholds a power. After all, a power enables something to be done; it does not compel, and an express statutory withholding of a particular power, where that is thought necessary, permits the suggested statutory change to be made without any distortion resulting in the nature of the office of personal representative.

relation to the administration of the estate, and since these rights, duties, and powers are not applicable to trustees, they should be expressly provided for by legislation. Thus, the law governing estate trustees would be the law of trusts, except where new legislation governing estates would apply.

Turning to the distinctions between administrators and executors, we have already indicated our belief that virtually none of them can be supported on a functional basis. We therefore recommend that the differences in the law between the offices of administrator and executor should be abolished, except for the difference relating to the manner in which persons are appointed to the offices.

Inasmuch as our recommendations to assimilate the position of the personal representative with that of trustee would involve a departure from the existing law, we believe that a new term should be employed to signify this important change. We recommend that a personal representative should be called an "estate trustee". This term will denote that the office comprehends both the unique functions of a personal representative of the deceased and the responsibilities of a trustee.

In order to clarify the precise nature of the new office, we recommend that the legislation should specify that the fundamental duties that are now associated with personal representatives are "trusts" under which the estate trustee holds the deceased's property. Accordingly, legislation should state that the estate trustee should hold the deceased's estate upon the following trusts:

(a) to exercise the powers conferred on him by law and by the will;

(b) to carry out the obligations imposed on him by law and by the will;

(c) to get in the estate of the deceased;

(d) to pay the debts of the deceased in accordance with the obligations imposed on him by law and by the will; and

(e) to distribute the estate of the deceased in accordance with the law and the will.

The legislation should clarify that the offices of administrator and executor have been assimilated. We believe that this best can be effected by defining the new term "estate trustee" to comprehend both offices. Accordingly, we propose the following definition:

In this Act, "estate trustee" means,

(a) the person named in the last will and testament of the deceased to represent him on his death, and

(b) the person appointed by the court to represent the deceased on his death.

Finally, since a single office of estate trustee is to be created, it will be necessary to replace letters probate and letters of administration with a single document issued by the court, which would be evidence of the appointment of the estate trustee. We recommend that this new document be called an "estate trustee certificate".

2. ACCESSION TO THE OFFICE

In the previous section, we noted the fundamental difference between accession to the office of an executor and an administrator under the existing law. An executor derives his power from the will and, therefore, may act in the estate from the moment of the testator's death.[51] This basic principle stands with the concurrent principle that a testator has the right to nominate an executor. Generally, courts have refused to interfere with that nomination unless the executor is demonstrably incompetent to act,[52] such as where the executor is serving a long prison term, has an interest adverse to that of a beneficiary, or is of unsound mind.[53] On the other hand, an administrator's title and authority is derived from the grant of letters of administration issued by the court. Since authority arises only from that grant, administrators have no independent right to act prior to appointment, although the doctrine of "relation back" to the time of death confers a measure of retrospective power.[54]

Our basic recommendation to merge the offices of executor and administrator in the new office of estate trustee demands a reassessment of the present dichotomy with respect to accession. While we have proposed the replacement of the two offices by a single office responsible for estate administration, our definition of "estate trustee" makes it clear that one might assume that office by virtue of nomination in the will or, in the absence of such nomination, by virtue of an appointment by the court. This raises a

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[51] *Re Hollwey and Adams* (1926), 58 O.L.R. 507, [1926] 2 D.L.R. 960 (App. Div.). In practice, executors usually need letters of probate as evidence of their authority to deal with the estate. Without probate, however, executors have the legal capacity to do almost everything incidental to their office.

[52] See, for example, *Re Agnew Estate*, [1941] 4 D.L.R. 653, 3 W.W.R. 723 (Sask. C.A.), and *Crichton v. Zelenitsky* (1946), 54 Man. R. 79, [1946] 2 W.W.R. 209 (Man. C.A.). A court will be very reluctant to decide that a named executor is incompetent to act. Bad character, insolvency and bankruptcy, for example, are not grounds *per se* upon which a court of probate may pass over an executor: see "Absent or Incapacitated Representatives" (1953), 103 L.J. 697.

[53] See, for example, *Re Becker* (1986), 57 O.R. (2d) 495, 25 E.T.R. 174, (Surr. Ct.); *Powers v. Powers Estate* (1988), 209 A.P.R. 336, 47 D.L.R. (4th) 471 (Nfld.S.C. T.D.); and *Mardesic v. Vukovich Estate* (1988), 30 B.C.L.R. (2d) 170 (S.C.).

[54] The doctrine of relation back allows certain acts to be done on the basis of the fiction that the title of the administrator "relates back" to the death of the deceased. The common thread running through the cases applying this doctrine seems to be protection of the estate from wrongful injury and conferring on the estate rights relating to beneficial transactions. See, also, rules of court, r. 9.03, *supra*, note 34.

question whether the same law should govern accession, irrespective of how the estate trustee has been appointed. We shall consider this issue in the following section. We shall also consider certain related issues: the effect of a legal disability on entitlement to the office; renunciation of the office of estate trustee; and transmission of the office.

(a) Appointment

(i) Where a Person is Appointed by Will

We have already indicated that the sole exception to our general recommendation to remove the differences in law between the office of executor and the office of administrator relates to the manner in which individuals are appointed. This is the only practical difference between the two offices.

There is a fundamental difference between the situation where there is an estate trustee named in the will, who is prepared to act, and the situation where there is no such person. In the former case, it is a simple matter to provide for immediate accession to the office, whereas in the latter case, there will necessarily have to be an intervening period between the death and accession to the office, during which there is an application for an estate trustee certificate. It is clear that the only way that identical rules can apply to both named estate trustees and other estate trustees is to provide that accession to the office would occur only upon the grant of the estate trustee certificate. If this were the case, it would be necessary to provide that all the power and authority of the estate trustee is derived from the grant of the estate trustee certificate.

Although acceptance of a rule stating that an estate trustee accedes to office only upon receipt of an estate trustee certificate would certainly follow from the fundamental recommendation that the distinctions between executors and administrators be abolished, such a rule cannot be justified on the basis of practical considerations. At present, the vast majority of estates are administered under the provisions of a will by a named executor who is willing to assume the office. In most cases, then, retention of the principle of immediate accession by named estate trustees will ensure the continuity necessary for effective management of the estate. To abandon this principle, we believe, would impede the efficiency of estate administration, to the ultimate detriment of the beneficiaries of the deceased. Moreover, in some cases it would be unnecessary for an estate trustee to obtain an estate trustee certificate—for example, if the sole asset of the estate were real property held on joint tenancy.

Leaving aside the practical implications of the principle of immediate accession, there is a second issue bearing upon the question whether the estate trustee should derive authority from the court grant in all cases: should the person named in the will of the deceased automatically become

estate trustee, where she is not otherwise precluded by law from assuming office for a specific reason?

In theory, a regime that could allow estate trustees to assume authority only upon the grant of an estate trustee certificate could afford the opportunity to beneficiaries to challenge the appointment in the will and suggest a nominee of their own. The reasons that such a position might be taken would vary with individual estates. One likely reason for dissatisfaction with the testator's choice would probably be that the costs of administration would be too high; a nominee of the beneficiaries might be willing to act for free or at a reduced rate. Similarly, the beneficiaries might prefer an estate trustee who would be expected to be more responsive to their views rather than taking an independent approach to the administration of the estate. There may also be situations where the beneficiaries are of the view that the selection of an estate trustee by the testator is not truly a considered decision, but a hasty choice made on the suggestion of the person drafting the will.

Whether the choice of the testator should continue to prevail, despite the wishes of the beneficiaries, is an issue of fundamental principle. Historically, the wishes of the testator have been considered paramount in all decisions respecting property. Yet, an argument can be made that the estate trustee administers the estate for the benefit of living beneficiaries rather than the deceased testator. Indeed, section 2 of the *Estates Administration Act* provides that all the property of the deceased is held by the personal representative "as trustee for the persons by law beneficially entitled thereto". In this report, we have recommended that the estate trustee should hold the property of the deceased upon certain stipulated trusts, including a trust to distribute the estate of the deceased in accordance with the law and the will.

On the other hand, the testator has more familiarity with the property, and may have a much clearer sense of what is in the best interests of the beneficiaries, who are often family members, and of the management scheme that is most appropriate for the property.

Allowing the appointment in a will to be challenged by beneficiaries on any grounds would increase litigation and permit interference with the early administration of the estate. Moreover, it would be inconsistent with what we perceive to be a consensus in the community that the wishes of the deceased should be respected, even if this entails additional cost or a degree of inconvenience to the estate or its beneficiaries.

Accordingly, we recommend continuation of the current law that the person named in the will of the deceased should be granted an estate trustee certificate and be appointed estate trustee; the beneficiaries should not be able to challenge the accession on any grounds, other than on the ground of incapacity or legal disqualification.[55] Notwithstanding the general desire

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[55] See discussion *infra*, this ch., sec. 2(a)(iii).

to assimilate the roles of executor and administrator, we further recommend that the estate trustee named in the will should continue to derive power from the will, and should be able to begin acting immediately upon the death of the deceased.

(ii) Where an Estate Trustee Must be Appointed by the Court

Where there is no will or the will does not name a person as estate trustee, or where the person named as estate trustee is unable or unwilling to assume the office, it will be the duty of the court to appoint an estate trustee. Conferral of this responsibility naturally raises an issue respecting the basis on which entitlement is to be determined. The present law governing the appointment of administrators is characterized by complexity and a degree of uncertainty and, in our view, should be clarified.

The complexity of the existing law is due, in part, to the fact that the law draws on two sources, namely, judicial principles and practices and the provisions of the *Estates Act*. The difficulty is compounded by the fact that there is disagreement whether the principles governing the appointment in the case of an intestacy apply to the appointment of an administrator with the will annexed.

In the case of an intestacy, courts established an order of priority of entitlement to apply for letters of administration. This order has been altered somewhat by modern legislation, which recognized persons born outside marriage and unmarried persons living in a conjugal relationship. Reflecting these changes, the current order of preference is as follows:

1. spouse of the deceased or the person of the opposite sex with whom the deceased was living in a conjugal relationship outside marriage immediately before death;
2. children of the deceased;
3. grandchildren of the deceased if no child is living;
4. great-grandchildren of the deceased if no child or grandchild is living and so on if there is a lineal descendant;
5. father of the deceased who leaves no issue;
6. mother of the deceased who leaves neither issue nor father;
7. brothers and/or sisters of the deceased who dies without issue or parent;
8. grandparents of the deceased who dies without issue, parent, brother or sister;
9. uncles, aunts, nephews, nieces, great-grandparents of the deceased who dies without issue, parent, brother, sister, or grandparent;

10. collateral relatives of more remote degrees, those of equal degree having an equal right.

Where there are no next-of-kin resident in Ontario, the Crown is entitled to apply for administration.[56]

In circumstances where the testator has made a will, or fails to appoint an executor in his will, or where the named executor is unable or unwilling to administer the estate, the court must appoint an administrator with the will annexed.[57] There seems to be confusion as to the order of preference that the court should follow in making an appointment. Some commentators state that the order is the same as that applicable in the case of an intestacy.[58] Hull and Cullity, however, state that "the right to administration follows the right to the property".[59] In their view, an order of preference different from that governing intestacy applies to grants of administration with the will annexed. Drawing on the English rules, they suggest that the following order of priority prevails:[60]

1. residuary legatees or devisees in trust;
2. residuary legatees or devisees for life;
3. ultimate residuary legatees or devisees, or, where the residue is not wholly disposed of, the persons entitled upon an intestacy;
4. legal personal representatives of persons indicated in 3;
5. legatees or devisees, or creditors;
6. contingent residuary legatees or devisees, or contingent legatees or devisees or persons having no interest in the estate, who would have been entitled to a grant had the deceased died wholly intestate;
7. the Crown.

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[56] *Crown Administration of Estates Act*, R.S.O. 1980, c. 105.

[57] An administrator with the will annexed would have to be appointed in the following circumstances: where the will does not name an executor; where the named executor has died during the lifetime of the testator or after his death without taking probate; where the executor has renounced probate, or having been cited to accept or refuse a grant of probate, has not appeared to the citation; where the appointment of an executor is void for uncertainty; where the court in its discretion passes over the executor and makes a grant to another; where the executor is incompetent to take probate by reason of his infancy or mental or physical incapacity; where an executor is out of the jurisdiction and applies for a grant to be made to his nominee.

[58] Brulé and Histrop, "Grants of Letters Testamentary", in *Law Society of Upper Canada Bar Admission Course Materials, 32nd Bar Admission Course*[:] *Estate Planning and Administration* (1990-91), at 11-4.

[59] Hull and Cullity, *supra*, note 1, at 256.

[60] *Ibid.*, at 256-57. The present English rule is r. 119 of the *Non-Contentious Probate Rules, 1954*. SI 1954/796.

The *Estates Act* also deals with the persons to whom administration should be granted. Section 54 of the Act provides, in part, as follows:

> 54.—(1) Subject to subsection (3), where a person dies intestate or the executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the surrogate court having jurisdiction to
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> (a) the person to whom the deceased was married immediately before the death of the deceased or person of the opposite sex with whom the deceased was living in a conjugal relationship outside marriage immediately before the death;
>
> (b) the next-of-kin of the deceased; or
>
> (c) the person mentioned in clause (a) and the next-of-kin,
>
> as in the discretion of the court seems best, and, where more persons than one claim the administration as next-of-kin who are equal in degree of kindred to the deceased, or where only one desires the administration as next-of-kin where there are more persons than one equal kindred, the administration may be committed to such one or more of such next-of-kin as the court thinks fit.[61]
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> . . .
>
> (3) Where a person dies wholly intestate as to his property, or leaving a will affecting property but without having appointed an executor thereof willing and competent to take probate, or where the executor was at the time of the death of such person resident out of Ontario, and it appears to the court to be necessary or convenient by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be administrator of the property of the deceased, or of such part of such property, other than the person who if this subsection had not been enacted would have been entitled to the grant of administration, it is not obligatory upon the court to grant administration to the person who if this subsection had not been enacted would have been entitled to a grant thereof, but the court may appoint such person as it thinks fit upon his giving such security as it may direct, and every such administration may be limited as it thinks fit.

Section 54(1) appears to have little impact on the principles that we have described above. In the case of intestacy, section 54(1) gives the court a discretion to make an appointment from among the "spouse" and next-of-kin, with none enjoying a preference as a matter of law. Hull and Cullity explain as follows:[62]

> The discretion is, however, a judicial one not to be exercised arbitrarily or capriciously but with due regard to the best interests of the estate and of all persons interested in the distribution of the property. The first duty of the Court is, therefore, to place the administration in the hands of that person who is

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[61] *Supra*, note 35, s. 54(1), as en. by S.O. 1986, c. 64, s. 66.

[62] Hull and Cullity, *supra*, note 1, at 220.

> likely best to convert it to the advantage of those who have claims, either in paying the creditors or in making distributions; the primary object is the interest of the property.

In practice, courts continue to follow the order of preference that governs intestacy.

Section 54(1) also deals with the situation where a named executor refuses to prove the will. In these circumstances, the court would grant administration with the will annexed. Hull and Cullity state that, while section 54(1) seems to indicate that the choice of administrator should be made from among the spouse or next-of-kin, the matter continues to be determined by the beneficial interest in the estate, according to the order of preference generally governing the administration with the will annexed.[63]

By contrast, section 54(3) does have a substantial impact on the appointment of administrators.Where the conditions of that provision are met, the court has a discretion to depart from whatever order of preference would have been applicable, and appoint a person as administrator other than the person who would otherwise be entitled.[64] It bears emphasizing that this wide discretion does not exist in all situations in which it is necessary to appoint an administrator or an administrator with the will annexed. Section 54(3) is applicable only where (1) there is an intestacy or the deceased has died without having appointed an executor willing and competent to take probate or has appointed an executor who is resident out of the province, and (2) by reason of the insolvency of the estate or other special circumstances, it appears to the court to be necessary and convenient to appoint a person as administrator other than the person who would otherwise be entitled.

A person may challenge the appointment of another person who has a prior right to appointment as administrator on the ground that there are "material objections" to the appointment of the latter. One of the most important possible grounds of objection is that the person otherwise entitled to appointment would have a conflict of interest with the estate.[65] Where a person applying for administration wishes the court to prefer her to persons with a claim of higher priority, that person must show that the others have renounced or consented or that they have been served with a citation, calling upon them to show why administration should not be granted to the applicant.[66]

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[63] *Ibid.*, at 256.

[64] For a discussion of the breadth of this discretion, see Hull and Cullity, *ibid.*

[65] *Ibid.*, at 221-22.

[66] Rules Governing Proceedings Under the *Estates Act*, R.R.O. 1980, Reg. 925 (hereinafter referred to as "Estates Rules"), rr. 19-21, Form 38. See, also, *Estates Act*, *supra*, note 35, s. 38, which provides that, where a person who is not a next-of-kin applies for letters of administration, there should be an order requiring the next-of-kin, or others having or pretending an interest in the property of the deceased, to show cause why administration should not be granted to the applicant.

From the foregoing description, it should be evident that the law governing the appointment of administrators is very complicated. The relevant legislation is difficult to understand and its relationship to the practice—and, in particular, to the order of preference that is followed by the courts in appointing administrators—cannot be found on a reading of the provisions. Moreover, there is disagreement on which order of priority applies where it is necessary to appoint an administrator with the will annexed.[67]

Legislation should deal with two matters. It should set out the order of preference[68] and should give the court a discretion to depart from that order where it would be advantageous to the administration of the estate to do so.

In setting out an order of priority, it is necessary to distinguish between situations of intestacy and situations where there is a will. In the case of intestacy, we recommend that the following order of preference should prevail:

1. spouse;
2. children;
3. parents;
4. grandchildren;
5. brothers and sisters;
6. great-grandchildren;
7. uncles, aunts, nephews, nieces, grandparents; and
8. other collateral relatives of more remote degrees.

In cases where there is a will, but it is necessary to appoint an estate trustee, we recommend that the order of preference should be based on the English rules governing a grant to an administrator with the will annexed.[69]

We wish to clarify the meaning of certain of the terms appearing above. We recommend that "spouse" should be given the expanded definition that is used in Part III of the *Family Law Act, 1986*,[70] which deals with support obligations. By virtue of this definition, "spouse" means not only either a man or woman who are married to each other, but also either a man or woman who are not married to each other and who have cohabited continuously for a period of not less than three years, or who have cohabited in a

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[67] Compare Hull and Cullity, *supra*, note 1, at 256 with Brulé and Histrop, *supra*, note 58.

[68] In England, the *Non-Contentious Probate Rules, 1954*, *supra*, note 60, rr. 19 and 21, set out an order of priority for administration with the will annexed and intestacy, respectively.

[69] See text at note 60, *supra*.

[70] *Supra*, note 31.

relationship of some permanence, if they are the natural or adoptive parents of a child.[71] We further recommend that "child" and "parent" should be given the same definitions used in the *Family Law Act, 1986*. "Child" is defined to include "a person whom a parent has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody".[72] "Parent" is defined to include "a person who has demonstrated a settled intention to treat a child as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody".[73] Finally, we observe that the definitions of "spouse", "child" and "parent" have been amended during the past fifteen years to adapt to changing conceptions of the family. It is possible that the present definitions appearing in the *Family Law Act, 1986* will be amended in the future. We recommend that, should the definition of "spouse", "child" or "parent" be amended, the definition of that term for the purposes of estates administration should be changed to reflect that amendment.

The recommended order of priority should be presumptive, and should not be followed where it would be to the detriment of the estate. Accordingly, we recommend that the court should be given a discretion to decline to appoint a person as estate trustee who would otherwise be entitled where it would not be advantageous to the administration of the estate, taking into account all relevant circumstances, to appoint that person. In such circumstances, the court should be empowered to appoint another person as estate trustee. However, where more than one person would be entitled to be appointed estate trustee, the court need not appoint that number. For example, if three children are equally entitled to the appointment, and the court concludes that one of them should not be appointed as estate trustee, it may simply refuse to appoint that person.[74]

(iii) Disabilities

Under the existing law, certain categories of person may not be able to act as executors or be appointed as administrators. The rules applicable to these exclusions are partly statutory and partly judicial creations. Among the classes that have been addressed are minors, criminals, bankrupts, persons

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[71] *Ibid.*, s. 29.

[72] *Ibid.*, s. 1(1).

[73] *Ibid.*

[74] Under s. 54(3) of the *Estates Act*, *supra*, note 35, the court has power only to appoint a person instead of the person otherwise entitled to the grant of administration. It cannot depart from the order of preference by declining to appoint that person.

incapable of managing their own affairs, and persons residing out of the jurisdiction.[75]

While minors may be appointed as executors, they cannot act as executors during the period of minority.[76] The *Estates Act*[77] provides that, if a minor is named as sole executor, administration with the will annexed is to be granted to the guardian of the minor or to such other person as the court thinks fit, until the minor attains the age of eighteen years, at which time probate of the will may be granted to him. Where there are two or more executors, of whom one is a minor, those of full age may prove the will. In such a case, the grant will reserve the right of the minor to accept probate on attaining his majority. In the case of an intestacy, administration cannot be granted to a minor, even though he may otherwise be entitled.[78]

Neither poverty nor bankruptcy in itself is an absolute bar to becoming an executor. Where the testator, aware of the circumstances, has nominated an insolvent person to be his executor, the latter will not be excluded in the absence of other reasons for a belief that the beneficiaries will be prejudiced.[79]

Persons who are not mentally competent may not act as personal representatives. Where an executor or the person otherwise entitled to letters of administration is mentally incapacitated at the time when the grant should be made, administration is granted to another person. If there is at least one other executor, probate may be granted to him. Where, however, there is only one executor and he is incapable, a special grant of administration is made for his use and benefit until he recovers.[80]

The position of persons residing outside of Ontario is addressed in the *Estates Act*. Section 24 provides that "[l]etters of administration shall not be granted to a person not residing in Ontario".[81] Under section 25, a person who does not reside in Ontario or elsewhere in the Commonwealth cannot be granted letters probate, unless the person has given the amount of security that is required of an administrator on an intestacy or the court dispenses with the security or reduces its amount.

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[75] Hull and Cullity, *supra*, note 1, at 153-57, and Sunnucks, Martyn, and Garnett, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (1982) (hereinafter referred to as "Williams, Mortimer and Sunnucks"), at 16-21.

[76] Hull and Cullity, *supra*, note 1, at 154.

[77] *Supra*, note 35, s. 51.

[78] Hull and Cullity, *supra*, note 1, at 214.

[79] *Ibid.*, at 156.

[80] For a description of the practice in Ontario, see Hull and Cullity, *ibid*, at 277-79.

[81] But see Hull and Cullity, *ibid.*, at 310.

While we have identified various categories of disability, we observe that the categories are not closed; nor are the bounds of certain of them firmly set. For example, one important category is where there is a conflict of interest between the prospective personal representative and the beneficiaries. Since the rules governing conflict of interest in this context owe their development entirely to the courts, this category is capable of expansion or contraction.

In view of the fluid nature of the categories of disability affecting entitlement to appointment, and the desirability of allowing the law to respond flexibly to unforeseen factual circumstances, we recommend that legislation should not list the circumstances that should disentitle a person from acting as an estate trustee. While the latter approach would conduce to certainty, it would not permit the court to deal with situations that are not anticipated in the statute. A better approach, we believe, would be to confer a general power on the court to decline to appoint any person to be estate trustee where it decides that the appointment of the person named in the will is not desirable for the effective administration of the estate, taking into account all relevant circumstances. We have already recommended that a residual power of this nature be given to the court where there is no will or no person is named as estate trustee in the will or the named estate trustee is unwilling or unable to assume the office. We recommend that this power should be extended to cases where the applicant for the estate trustee certificate is named in the will.

The only category of disability that we wish to address is that of the prospective estate trustee who resides out of the province. The present law is characterized by distinctions which, if they once were supportable, are no longer justifiable. Under the *Estates Act*, a non-resident may not be granted letters of administration.[82] Yet, on giving the requisite security, "a person not resident in Ontario or elsewhere in the Commonwealth" may be granted letters probate. The Act also provides for temporary administration where the next-of-kin entitled to administer the estate are absent from Ontario, pending their return.[83]

We can discern no functional basis for allowing the distinction between executors and administrators to continue. Nor do we see any principled reason to distinguish between non-residents living in Commonwealth countries, who can receive a grant of letters probate without providing security, and non-residents living in other countries, who can do so only upon giving security. Indeed, in certain circumstances, the present law may produce

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[82] However, where probate or letters of administration have been granted by a court of competent jurisdiction in the United Kingdom or in a province or territory of Canada or in any British possession, a copy of the letters probate or letters of administration may be deposited with the Ontario Court (General Division) and resealed by the court, which gives them the same effect in Ontario as if they had been granted by the Ontario Court (General Division): *Estates Act*, *supra*, note 35 , s. 77(1).

[83] *Estates Act*, *supra*, note 35, s. 38.

injustice where, for example, a sole beneficiary who resides out of Ontario cannot obtain letters of administration. Surely, the speed and efficiency of contemporary methods of communication will facilitate the administration of estates by persons residing out of the province. Moreover, estate trustees will be assisted by the extensive power of delegation that we shall recommend later in this chapter.[84] In those cases where distance does prove to be an impediment to sound administration, an application may be made to remove the estate trustee, in accordance with the recommendation that we shall make below.[85]

Accordingly, we recommend that a non-resident of Ontario should be entitled to apply for an estate trustee certificate, subject to compliance with the bonding provisions to be specified by legislation.[86]

(b) Renunciation of the Office

A prospective estate trustee may prefer to disclaim his right to the estate trustee certificate. Under the existing Ontario law, the extent to which executors and administrators may renounce their offices is subject to certain rules, which cannot be applied to the new office of estate trustee without substantial modification.

At present, by the execution of a formal writing, a person may abandon her right to a grant of letters probate or letters of administration. The document must be filed with the court, together with the original will.[87] In addition, where an executor fails to bring in a will for probate within fourteen days of the testator's death, or, on an intestacy, letters of administration have not been issued, an interested person may cite the person entitled to be personal representative to decide whether to accept or refuse the office.[88]

In the case of an executor, the effect of renunciation is governed by the *Estates Act*,[89] which provides that all rights in respect of the executorship cease, and further representation and administration will take place as if the person renouncing had not been appointed executor.[90] The courts have

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[84] See *infra*, this ch., sec. 3(e)(ii).

[85] *Ibid.*, sec. 6(c)(ii).

[86] We do believe that, in general, prospective non-resident estate trustees should be required to post adequate security for the protection of the beneficiaries and creditors of the estate: see discussion, *infra*, ch. 4, sec. 7.

[87] In certain circumstances, the original will may be unnecessary. If the will has been lost, a verified copy and an affidavit attesting to the loss of the original will should be filed.

[88] Estates Rules, *supra*, note 66, rr. 48 and 55.

[89] *Supra*, note 35, s. 59.

[90] *Stinson v. Stinson* (1851), 2 Gr. 508 (Ch.), and *Allen v. Parke* (1866), 17 U.C.C.P. 105 (C.P.).

imposed certain limitations on the right of executors to renounce: an executor may not renounce in part, or if there has been intermeddling in the estate. Finally, where the executor is a minor, the right to probate cannot be renounced on his behalf by his guardian.[91]

The position of a person who has a prior right to letters of administration differs in certain significant aspects. First, renunciation of the office is permitted, notwithstanding intermeddling in the estate. Second, a minor who is entitled to letters of administration may renounce his right to a grant through a guardian. Finally, courts have been more willing to allow retraction of a renunciation by administrators.[92]

In our view, the existing law governing renunciation presents certain difficulties for the new office of the estate trustee. Apart from specific principles that we find unclear or with which we disagree, the law reflects the historical dichotomy between executors and administrators that we have sought to erase. For these reasons, we believe that legislation should deal with renunciation in some detail.

A threshold issue is whether estate trustees should have a right of renunciation that may be exercised freely, or one that is subject to the approval of the court. It has been suggested that imposing a limitation on the right of renunciation might be an appropriate method of dealing with an alleged practice by so-called "professional trustees" — for example, solicitors, trust companies, or accountants — of renouncing executorship where it is not financially attractive or the administration appears to be too troublesome. In such cases, it is argued that these trustees have induced reliance by the testator, who was given the impression that they would act as the executors; therefore, they in effect had assumed an obligation to the testator, which it would be inequitable to allow to be evaded without due regard to the interests of the estate.

While we do acknowledge that there may be a problem, we are unpersuaded that the answer is to place renunciation under judicial control. Even if there are situations where testators have been induced to appoint executors who later do not wish to assume the office, it would hardly be in the best interests of the estate to compel administration by them. Moreover, we believe that the problem to which reference has been made will, in part, be solved by our recommendation to allow an estate trustee to apply to the court for permission to waive the remuneration fixed by the will and obtain compensation determined by the court.[93] Consequently, we recommend that an estate trustee named in the will or a person entitled to apply to the court to be appointed estate trustee should be entitled to renounce her right to be appointed estate trustee by an instrument in writing filed with the court.

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[91] Hull and Cullity, *supra*, note 1, at 187.

[92] *Ibid.*, at 188-89.

[93] *Infra*, this ch., sec. 5(c).

As we have stated, certain details of the law pertaining to renunciation should be clarified in their application to estate trustees. One principle that should be abrogated is the rule that there cannot be a partial renunciation. Under the existing law, where a surviving spouse is appointed the executor of her husband's estate, she becomes the executor of all the estates of which he was the executor. The rule preventing partial renunciation prevents her from choosing to administer her husband's estate and renouncing the administration of estates of which he was executor, and for which she does not wish to be responsible. This seems to be an inflexible and absurd result. We therefore recommend that an estate trustee named in the will or a person entitled to apply to the court to be appointed estate trustee should be entitled to accept appointment as estate trustee, while at the same time she should be able to renounce her rights with respect to the administration of any estates to which she might have been entitled because the deceased was an estate trustee.

We believe that the differences in the existing law between executors and administrators should not be continued. With respect to the effect of intermeddling, we believe that the rule applicable to administrators reflects the appropriate approach. In principle, we see no reason why intermeddling in the estate should be of any consequence in determining whether an uninterested person should be required to serve as estate trustee over an extended period of time. If the intermeddling has benefited the estate, the person should not be punished for such acts by being denied the normal right of refusing the office of estate trustee. If the intermeddling has been detrimental to the estate, such person should be liable to the estate on the normal principles of liability governing interference with the property of others. Indeed, to preclude renunciation in such circumstances would require an estate to have an estate trustee who not only is unwilling, but has demonstrated his lack of ability or dedication to the proper administration of the estate. Such a result, to say the least, would be curious. Consequently, we recommend that a person named in a will or entitled to apply to the court to be appointed estate trustee should be entitled to renounce his right to be appointed estate trustee, notwithstanding the fact that he has intermeddled in the administration of the estate. The person, however, should remain liable for any loss caused by his intermeddling.

The distinction between executors and administrators with regard to minors should not apply to estate trustees. Again, we believe that the better approach is that taken in relation to minor administrators, who are allowed to renounce their right to administration through their guardians. We recommend therefore that a minor who is named estate trustee in the will or who is a person entitled to apply to the court to be appointed estate trustee should be able to renounce the right to be appointed estate trustee by instrument in writing executed by a guardian of the property of the minor appointed under the *Children's Law Reform Act*[94] or by the Official Guardian.

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[94] R.S.O. 1980, c. 68.

The final matter that we shall address is retraction of a renunciation. It would appear that courts in the United Kingdom, Australia, and New Zealand allow an executor to retract a renunciation, but grant permission to do so only in "very exceptional circumstances".[95] Retraction of a renunciation by a person entitled to administration, however, is sanctioned more freely. In our view, the extent of the right to retract should be clarified by legislation, and that right should be available to both estate trustees named in the will and to persons entitled to apply for an estate trustee certificate. We believe that the right should be available at any time subject to court approval. Judicial scrutiny will ensure that retraction will be allowed only in appropriate circumstances. Where, for example, the retraction is capricious or will interfere unduly with the effective administration of the estate, we would expect the court to withhold permission. We therefore recommend that, subject to court approval, retraction of a renunciation should be permitted at any time.

(c) Transmission of the Office

One of our primary concerns is to facilitate the efficient administration of estates. During the course of administration, an estate trustee may die, or may, in accordance with recommendations that we shall propose later, retire or be removed from office.[96] The possible occurrence of such events raises concerns that the ongoing administration of the estate not be unnecessarily disrupted. While this is a more substantial concern in the case of the administration of a trust, owing to the longer duration of express trusts, it nonetheless should be addressed in the context of estate administration.

The Commission considered this matter in the *Report on the Law of Trusts*.[97] As a matter of general principle, it took the view that the statutory powers of non-judicial appointment and discharge of trustees should be relatively simple and should provide, as much as possible, the same assurances with respect to the validity of appointment and the vesting of property as are afforded by the more expensive and cumbersome means of a court application. In this section, we are not concerned about the circumstances under which an estate trustee may be removed by the court.[98] Nor will we address vesting of the estate property in new estate trustees.[99]

Our concern is that which animated our proposals in the *Report on the Law of Trusts*. We are of the view that the continuity of administration is as crucial in the administration of estates as in the management of trusts.

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[95] Hull and Cullity, *supra*, note 1, at 188.

[96] See *infra*, this ch. 6(c).

[97] Trusts Report, *supra*, note 3, at 85-120.

[98] *Infra*, this ch., sec. 6(c)(ii).

[99] *Infra*, ch. 5, sec. 4(a).

Essential to this is a simple and efficacious means of appointing new estate trustees, should the need arise.

The present law governing estate administration does not address the issue of non-judicial accession to the office, except in the case of the death of a personal representative. At present, neither executors nor administrators may retire from office without a court order;[100] removal of a personal representative may be ordered by the Ontario Court (General Division), on the application of an executor or administrator or any person interested in the estate.[101] An executor cannot assign his office because it is "an office of personal trust".[102] Likewise, the powers and rights of an administrator generally are not transmissible.

The general rule of non-transmissibility is subject to a limited exception in the case of the death of a personal representative. The position of executors is explained by Hull and Cullity as follows:[103]

> [T]he rights and responsibilities of an executor are in certain circumstances transmissible by will. Thus, if a sole executor, or the survivor of several executors, having proved the will, dies without having completed the administration of the estate, his executor when he proves the will becomes the executor of the original testator unless the deceased, as the sole or the only surviving executor, has appointed a separate executor for the estate of which the deceased had been the executor.It is only an executor who has proved the will who can transmit the executorship, and, therefore, if the executor named predeceases the testator or dies without having taken probate there must be an administration.
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> When there are more executors than one, the executorship is transmitted through the survivor of the acting executors. Thus if A and B are appointed executors, both proving the will, and A predeceases B leaving an executor, but B subsequently dies intestate, A's executor does not succeed to the executorship of the original testator. But if A alone proves, the rights of B having been reserved, and on A's death B is cited but does not appear, A's executor succeeds.
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> . . .
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> The administrator of an executor does not succeed to the executorship nor does the executor of someone appointed executor by the Court under The Trustee Act.

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[100] *Trustee Act*, *supra*, note 32, s. 2(2).

[101] *Ibid.*, s. 37.

[102] Williams, Mortimer and Sunnucks, *supra*, note 75, at 40. But see Baker, *Widdifield on Executors' Accounts* (5th ed., 1967) (hereinafter referred to as "Widdifield"), who argues (at 413) that s. 3 of the *Trustee Act* clearly implies that a sole or sole surviving executor may retire and appoint a successor.

[103] *Supra*, note 1, at 162-64. But see *Trustee Act*, *supra*, note 32, s. 37(6), which provides that the office is not transmissible to the executor of an executor appointed under s. 37 to replace an executor who has been removed by the court.

Administrators are in a different position under the present law. Generally, their rights and powers are not transmissible. Nor do the principles outlined in the quoted passage apply to them in the case of death. The only exceptions to this are established under the *Trustee Act*. Section 46 of the Act provides as follows:

> 46.–(1) Where there are several personal representatives and one or more of them dies, the powers conferred upon them shall vest in the survivor or survivors, unless there is some provision to the contrary in the will.
>
> (2) Until the appointment of new personal representatives, the personal representatives of the representative for the time being of a sole personal representative, or, where there were two or more personal representatives, of the last surviving or continuing personal representative, may exercise or perform any power or trust that was given to, or capable of being exercised by the sole or last surviving personal representative.

The applicability of these provisions to administrators results in two narrow exceptions to the rule that the office of administrator is not transmissible. The first is where there are more than two administrators, and powers of the deceased administrator are conferred on her survivor or survivors. The second provides for a temporary transmission of the office on the death of the administrator, effective only until the appointment of a new administrator for the original estate.

The considerably greater extent to which the office of executor is transmissible is based on a perception of the privileged position of the executor by reason of his nomination by the testator. The traditional assumption that the testator has reposed "special confidence" in her executor is at the core of the distinction.[104]

We are of the view that the present law should not apply to the new office of estate trustee without amendment. It makes no provision for non-judicial appointment of additional estate trustees in the event of voluntary retirement or removal by the court, both of which will be permitted to occur pursuant to recommendations that will be proposed later in this chapter.[105] Should one of these events occur, in the absence of an expeditious mechanism for appointing new estate trustees, the administration of the estate will be impeded. In addition, we believe that the distinction in the treatment of executors and administrators with respect to the devolution of the office on death should not apply to the estate trustee by similarly distinguishing between estate trustees named in the will and estate trustees who are appointed by the court. The rationale for the distinction is untenable. In a world where testators appoint large trust companies as their executors, and where there is a relatively high degree of mobility among the population, we doubt whether any "special confidence" can be said to repose in an executor

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[104] *Ingalls v. Reid* (1865), 15 U.C.C.P. 490 (C.P.).

[105] *Infra*, this ch. 6(c).

to appoint a successor to the original estate. Where the executor of an executor is unaware of the original testator or his estate, he would seem to be less capable of, or interested in, dealing with it than would a person eligible to apply for letters of administration. We believe therefore that there is no reason to distinguish between persons who are chosen estate trustees by a will and persons who must be appointed by the court.

In the *Report on the Law of Trusts*, we discussed the power of trustees to appoint additional or substitute trustees upon the happening of certain events. After due consideration of several related issues, we recommended the enactment of detailed provisions in the proposed new *Trustee Act* to govern non-judicial appointment of trustees.[106] The proposed *Trustee Act* provides that if, for example, a trustee dies, the persons nominated by the trust instrument for the purpose of appointing substitute or additional trustees may by deed appoint one or more persons to be a trustee or trustees in the place of the trustee who has died. It further provides that, if there is no such person or if there is no such person able and willing to act, then the one or more surviving or continuing trustees, or the personal representatives of the last surviving or continuing trustee, may by deed appoint one or more persons to be a trustee or trustees in the place of the trustee who has died.[107] We also recommended that the sole trustee, or the last surviving or continuing trustee, be permitted to appoint by will one or more persons to act as a trustee or trustee in his place after his death.[108]

We believe that these provisions should apply as well when an estate trustee has died, retired, or been removed, and we so recommend.

3. POWERS AND DUTIES OF THE ESTATE TRUSTEE

Pursuant to our initial recommendation, the office of estate trustee will be assimilated to that of a trustee. Generally speaking, the estate trustee will have all the powers possessed by a trustee under our proposed new *Trustee Act* and, in addition, will have the powers and duties necessary and incidental to his basic responsibility as personal representative of the deceased. We have expressed the duty to exercise these powers and to fulfil these duties as a series of "trusts" upon which the estate trustee holds the property of the deceased.

In this section, we shall discuss the various powers and duties of an estate trustee. We shall consider both the powers and duties that are shared with an ordinary trustee and those that are unique to the estate trustee. Not all the powers and duties of the estate trustee, however, will be discussed in

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[106] Trusts Report, *supra*, note 3, at 92-112, Draft Trustee Bill, ss. 19-25.

[107] Draft Trustee Bill, s. 19(1).

[108] *Ibid*, s. 20.

this chapter. The power to sell estate assets will be discussed in chapter 5, in the context of our examination of several difficult issues respecting the transfer of the assets of deceased persons. We shall discuss aspects of the estate trustee's duty to pay debts in chapter 4, which addresses issues relating to the satisfaction of creditors and other claimants.

Before turning to consider specific duties associated with the representation of the deceased, we wish to indicate that one important consequence of our recommendation to assimilate the office of estate trustee to that of a trustee is that the exercise of powers and the discharge of duties by the estate trustee will be governed by the general principles that will apply to trustees pursuant to the proposed new *Trustee Act*. These principles relate to the basic duties of trustees, which include the duty of care, diligence, and skill and the duty not to permit their personal interest to conflict in any way with his duty to those whom he serves. We have discussed the general principles respecting these duties in chapter 2 of the *Report on the Law of Trusts* and have made recommendations concerning them, which are incorporated in our proposed *Trustee Act*. In this chapter, we do not intend to recapitulate that discussion or reiterate those recommendations. However, in the ensuing discussion, reference shall be made to our trust recommendations, where appropriate. We shall consider the duty of care when we discuss the nature and extent of the liability of the estate trustee. In our consideration of the various powers and duties of the estate trustee, we shall discuss the power of delegation by estate trustees.

We turn first to duties peculiarly associated with acting as a representative of a deceased person, and then consider the more general powers and duties.

(a) Duty to Dispose of the Body of the Deceased

One of the immediate tasks in the administration of an estate is to attend to the disposal of the body of the deceased. Obviously, if a problem occurs, it does so at a time of acute emotional stress for the family and friends of the deceased, and should be resolved without delay. In this context, the law should strive to provide clear guidelines for the estate trustee and the family of the deceased so that the respective obligations are understood and the potential for conflict is attenuated, if not removed.

Unfortunately, the present law does not meet these standards. In certain respects, it is unclear. To some extent, this is because very few reported cases deal with issues that arise in connection with the disposal of the body, and because the applicable rules are based on outdated assumptions and concepts.

We believe that the present law concerning the disposal of the body of the deceased should be clarified. In our view, two matters need to be addressed: (1) the duty to dispose of the body; and (2) the manner of disposal, including the effect of directions given by the deceased.

There is some uncertainty in the law respecting the duty of disposal. Even referring to "the duty" is somewhat misleading, since it is doubtful whether it can be enforced.[109] However, a failure to carry out the duty may lead to criminal liability.[110]

The law is clear where the deceased is a man or an unmarried woman who has appointed executors: the primary duty rests on the executors.[111] In the case of a deceased married woman, however, the law is unclear. At common law, the duty rested on her husband;[112] this followed from the inferior status of a married woman at common law—in particular, the principle of unity of personality under which she was completely identified with her husband—and her limited capacity to hold property.[113] With the enactment of modern legislation placing a married woman in the same position as a man with regard to the ownership and disposition of property, the better position would seem to be that, where a married woman has appointed executors, the primary duty to dispose of her body rests on them, at least where she leaves sufficient assets in her estate to pay for such disposal.[114] In other cases, however, it appears that the common law duty of the husband may remain.

It is not entirely clear whether, under the existing law, a married woman is under a reciprocal duty to dispose of the body of her deceased husband where he has not appointed executors. Undoubtedly, courts would not have found such a duty as a matter of common law, given the subordinate position of married women. At present, a court would take a different view of this matter, and would presumably find it impossible not to impose the same duty on a married woman that rests on a married man.

The duty to dispose of a body may rest on someone other than an executor or a spouse. Depending on the circumstances, statutes may impose this duty on hospitals,[115] medical schools,[116] and municipalities.[117] English

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[109] In *Rogers v. Price* (1829), 148 E.R. 1080, at 1083, the court observed that "[i]t is not that sort of duty which can be enforced by mandamus or other proceedings at law". The word "law" was not used in contradistinction to "equity"; he did not seem to suggest that the duty was enforceable at equity.

[110] *Criminal Code*, R.S.C. 1985, c. C-46, s. 182(a).

[111] *Williams v. Williams* (1882), 20 Ch. D. 659, [1881-5] All E.R. Rep. 840; *Hunter v. Hunter* (1930), 65 O.L.R. 586, [1930] 4 D.L.R. 255 (H.C. Div.); and *Schara Tzedeck v. Royal Trust Co.*, [1953] 1 S.C.R. 31, [1952] 4 D.L.R. 529.

[112] *Bradshaw v. Beard* (1862), 31 L.J.C.P. 273, 142 E.R. 1175.

[113] *Rees v. Hughes*, [1946] K.B. 517, [1946] 2 All E.R. 47 (C.A.) (subsequent reference is to [1946] K.B.).

[114] *Ibid.*, at 526.

[115] *Public Hospitals Act*, R.S.O. 1980, c. 410, s. 22.

[116] *Anatomy Act*, R.S.O. 1980, c. 21, s. 7. See, also, *Cemeteries Act*, R.S.O. 1980, c. 59, s. 53.

[117] *Anatomy Act*, *supra*, note 116, s. 11.

cases assert that a duty of disposal may rest on parents[118] and householders.[119] No reported Ontario case has dealt with these matters.

The right of disposal of the body follows the duty of disposal. It is trite law that there is no property in a dead body;[120] thus, there is no source of independent rights in relation to the disposal of the body. The person who has the duty of disposing of the body is treated as having correlative rights, including the right to hold and protect the body until it is ready for disposal, the right to select the place and manner of disposal, and the right to carry out the disposal. Interference with these rights can constitute actionable wrongs.[121]

We believe that the law should be clarified with respect to the duty to dispose of the body of a deceased person.[122] At present, while it would appear that this duty rests on the executor, this is not entirely clear with respect to a deceased married woman. In our view, as a general rule, the duty of disposal should fall upon the estate trustee, and we so recommend. Where, however, there is no will or an estate trustee has not been named in the will, there will be a practical problem if the court does not appoint an estate trustee in sufficient time. In such circumstances, the obligation of disposal must be imposed on another.

It is not unduly burdensome to attend to the details of disposal. Our society has relegated most of the duties to funeral directors licensed under provincial legislation.[123] Consequently, we recommend that, if no estate trustee has been named in the will or appointed by the court, or if the estate trustee is unavailable or unwilling to act, the family members should have the duty to dispose of the body of the deceased in accordance with the following order of priority. The duty should be given first to the surviving spouse with whom the deceased was living at the time of death. Where there is no surviving spouse, children of the deceased of the age of eighteen years

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[118] *R. v. Vann* (1851), 169 E.R. 523 (*dicta*); *R. v. Price* (1884), 12 Q.B.D. 247; and *Clark v. London General Omnibus Co. Ltd.*, [1906] 2 K.B. 648 (C.A.).

[119] *R. v. Stewart* (1840), 113 E.R. 1007 (Q.B.), at 1009 (*dicta*), and *R. v. Price*, *supra*, note 118, at 252-53.

[120] *Williams v. Williams*, *supra*, note 111.

[121] *Emonds v. Armstrong Funeral Home Ltd.*, [1930] 3 W.W.R. 649 (Alta. S.C. App. Div.).

[122] Generally, liability for funeral expenses rests on the person with the primary duty to dispose of the body: see, generally, Williams, Mortimer and Sunnucks, *supra*, note 75, at 701-02.

In chapter 4 of this report, we recommend that, in the case of insolvent estates, expenses for the disposal of the body of the deceased should constitute a charge on the unencumbered portion of the assets of the deceased ranking in priority to testamentary expenses and the costs of administration, to the extent that the expenses for the disposal of the body were reasonable in the circumstances. We recommend that disposal expenses should include, among other things, funeral expenses, transportation expenses, casket, cemetery charges and a marker.

[123] *Funeral Directors and Establishments Act*, S.O. 1989, c. 49.

or older, should have the duty. Where there is no surviving children of the deceased of the age of eighteen years or older, the parents of the deceased person should have the duty. If there is no surviving parent, the brothers and sisters, of full or half blood, of the deceased of the age of eighteen years or older should have the duty. The terms "spouse", "child" and "parent" should be defined in accordance with the recommendations that we made earlier in connection with the appointment of an estate trustee by the court.[124]

One of the most important decisions to be made concerns the manner of disposal of the body. Two questions are related to this matter. What methods of disposal are legally permissible? Should the person discharging the duty of disposal be subject to direction as to the manner of disposal, either by the deceased or by a member of by the deceased's family?

In large part, the present law reflects the experience that the usual method of disposal of a dead body in England and Ontario has been burial. In 1884, cremation was held to be lawful in England, provided that a nuisance was not caused thereby.[125] While no Ontario case has addressed this question, there can be no doubt that cremation is lawful; it is widely practised and is regulated under the *Cemeteries Act*.[126]

As we have explained, the person with the duty of disposal has the right of disposal, which involves the right to possession of the body for the purpose of disposal and the right to determine the manner of disposal. When this rule was established, the right to determine the manner of disposal was of little practical consequence. Since there was an established Church in England and the almost invariable method was burial in the local churchyard, there was unlikely to be any disagreement respecting this matter. In the absence of an established religion in Ontario and with the availability of an alternative to burial, the right to decide the method of disposal does assume some importance.[127]

Under the present law, directions by the deceased as to the disposal of his body, whether or not in testamentary form, are not legally binding on the person with the right and duty of disposal of the body.[128] The doctrinal underpinning of this rule is the principle that there is no property in a dead

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[124] *Supra*, this ch., sec. 2(a)(ii).

[125] *R. v. Price*, *supra*, note 118.

[126] *Supra*, note 116, ss. 77-81. These sections were first enacted by *The Cemetery Act, 1932*, S.O. 1932, c. 40, s. 3.

[127] See, for example, *Hunter v. Hunter*, *supra*, note 111, where there was a disagreement between the executor and the widow and her children as to which religious rite was to be followed in burying the deceased.

[128] *Williams v. Williams*, *supra*, note 111; *Hunter v. Hunter*, *supra*, note 111; and *Schara Tzedeck v. Royal Trust Co.*, *supra*, note 111.

body. In theory, this prevents the deceased from disposing of his dead body by will.[129] Thus, the deceased cannot make a binding direction that his body is to be cremated or that his funeral should be conducted according to the rites of a particular religion. In Ontario, the rule as to the legal ineffectiveness of directions by the deceased is qualified by the *Human Tissue Gift Act*, which makes binding a consent to a use of the body or body parts for therapeutic purposes, medical education or scientific research.[130]

Notwithstanding the state of the law, wills often include directions concerning the manner of disposal of the body. Moreover, many people are under the misapprehension that these directions are binding in law. It is likely that in most cases there is compliance with them.

In our view, the doctrinal reason for the rule denying the binding effect of directions by the deceased is unsatisfactory, and is irrelevant to the basic policy issue whether the rule should continue to be a part of Ontario law. The fact that a person can give a consent under the *Human Tissue Gift Act*, which binds the person charged with the duty of disposal, but cannot give a binding direction, for example, that he wishes his body to be cremated, or that certain religious rites should be performed, is oddly anomalous. We consider that the current rule is opposed to what we perceive to be a general—and understandable—sentiment in the community. We see no reason why the law should not defer to the common belief that the deceased should have a choice in the manner of the disposal of his body. Accordingly, we recommend that directions by the deceased should be binding on the person with the duty of disposal, in accordance with the recommendations below.

Certain aspects of this principle warrant further clarification. We have considered whether the directions should be binding only if expressed in testamentary form. The argument in favour of such a restriction is that, in the relevant circumstances, where decisions must be taken quickly, there should be a minimum of uncertainty as to whether a direction has been made and whether it has been countermanded. We acknowledge that imposing such a formality may give rise to some difficulty. The will of the deceased may not be found during the period when the decision respecting disposal must be made. Many persons will not make a will, either because they have little property or because they are content that their property should pass on an intestacy. Moreover, we realize that the *Human Tissue Gift Act* provides an example of a direction that is binding, although it is not necessarily in testamentary form.

We regard the evidentiary considerations as decisive in this context. Given the immediate need for the disposal of the body of the deceased, uncertainty as to the directions should be avoided, where possible. In our

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[129] *Williams v. Williams*, *supra*, note 111.

[130] R.S.O. 1980, c. 210, s. 4, as am. by S.O. 1986, c. 64, s. 19(3) and (4).

view, any directions by a person should be followed if they are in a will. However, we realize that individuals may choose not to make a will to dispose of their property, but may still want to give directions for the disposal of their body. They too deserve to have their wishes respected.

On balance, given our concern that there be clear evidence of the deceased's intention, we are of the view that her wishes must be recorded in a document for them to have legal effect. Accordingly, we recommend that the directions of a deceased regarding disposal of his body should be binding on the person under a duty to dispose of the body only if set out in the will or any document dictated or signed by the testator.

If the directions in the will or other document are to be followed, the person responsible for assuring compliance obviously must be aware of them prior to disposal of the body. To ensure that the wishes of testators are respected as much as possible, we recommend that there should be a duty on the estate trustee or any person under a duty to dispose of the body of the deceased to make reasonable efforts to ascertain whether the deceased left binding directions concerning disposal of the body. Imposing such a duty would not be unduly onerous, as we expect that the courts will liberally construe "reasonable efforts" to locate the will or other document.

Thus far, our discussion has assumed that a testator has executed a will or other document that gives directions for the disposal of his body. Yet directions may not be available: for example, the deceased may leave no will, or the will may not be located within a reasonable time after the death of the deceased, or the will may make no provision for the disposal of the body. The possibility that any of these circumstances might occur raises a question concerning who should have the right to determine the manner of disposal. We believe that, even though the estate trustee would have the duty of disposal, the members of the deceased's family should have the right to make the decision respecting the manner of disposal. This would effect a change from the existing law, under which the person with the duty of disposal has the unfettered right to make this decision. We believe that the change is justified by the sensitive nature of the decision. Given the emotional state of the family members, it would be unnecessarily callous to prefer the estate trustee. Accordingly, we recommend that, if the deceased has left no binding directions concerning disposal, or if his directions cannot be located within a reasonable time of death, the estate trustee should be required to dispose of the body of the deceased in accordance with the wishes of the members of the deceased's family, according to the order of priority that we set out below. The estate trustee should make reasonable efforts to locate the family members to ascertain their directions.

Legislation should establish the order of priority respecting the right to give directions to the estate trustee. First priority should be given to the surviving spouse with whom the deceased was living at the time of death. Where there is no surviving spouse, or the spouse does not give a direction within a reasonable time, then a direction by a child of the deceased of the age of eighteen years or older, or if there is more than one, a direction of

the majority of the children of the deceased of the age of eighteen years or older, should be binding with respect to the disposal of the body of the deceased. If a majority cannot agree within a reasonable time, a parent or parents of the deceased person may make a direction. If there is no surviving parent, or there is no direction from the parent or parents within a reasonable time, a brother or sister of the deceased, of full or half blood, of the age of eighteen years or older, or if there is more than one, a majority of them may make a direction. The terms "spouse", "child" and "parent" should be defined in accordance with the recommendations that we made earlier in connection with the appointment of an estate trustee by the court.[131]

Circumstances may arise where there are no binding directions in the will, and the estate trustee may be unable to locate the family members in order to receive directions or, after finding them, may not receive directions within sufficient time. To deal with this situation, we recommend that, where the deceased has left no will, or the will cannot be located within a reasonable time after the death of the deceased, or if the will has made no provision for the disposal of the body of the deceased, and the estate trustee, after reasonable inquiry, cannot locate the family members or has received no binding directions from them within a reasonable time, the estate trustee should have the right to decide the details of disposal of the body of the deceased.

A further question is whether the new right of a testator to make a binding direction respecting the disposal of his body should be conclusive, so that the person under the duty of disposal would be obliged to follow his instructions, ignoring all other considerations. This would be a concern if a testator were to direct that an unreasonable amount of money be spent on the disposal of his body to the disadvantage of creditors of the estate. What may seem to be a reasonable direction when the will is executed may be regarded in a different light should circumstances alter and, in particular, if there is uncertainty concerning the solvency of the estate. On balance, we believe that the power to bind the estate trustee should be qualified to allow the estate trustee to respond appropriately to changes in circumstances and to unreasonable requests. We recommend that a direction made pursuant to the above recommendations, whether by will or other document, or by a person given the right to give such a direction, should be binding on a person with the duty to dispose of the body unless it is not financially reasonable in the circumstances.

The final matter to which attention should be given is the definition of the expression, "disposal of the body", which we have used throughout this discussion. In our view, legislation should define "disposal of the body" to

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[131] *Supra*, this ch., sec. 2(a)(ii).

mean any lawful disposal of a body that may be made under Ontario law, and we so recommend.[132]

(b) Duty to Maintain Records and to Provide Information

Pursuant to the recommendations that we shall make in the balance of this chapter and in chapter 4, the estate trustee will be subject to certain duties with respect to beneficiaries and creditors of the estate. Both beneficiaries and creditors thus will have a legitimate interest in ascertaining whether these duties are being discharged and their rights are being safeguarded. The present law, however, does not advance this interest effectively; access to the records and information pertaining to the estate is uncertain or is too difficult.

The law has not addressed the issue of access to information generally. Rather, the law deals separately with two matters relating to the disclosure of information. These are the duty of the personal representative to account and the duty to provide an inventory of the estate. We shall first discuss the duty to account.

Generally speaking, the duty to account concerns the maintenance of ongoing records and the provision of information to persons lawfully entitled thereto. This would include affording an opportunity to inspect the records. The jurisprudence has not delineated specific rules to govern the proper method of keeping estate accounts. The basic principle is simply that the accounts should show clearly the property of the estate and the dealings of the personal representative with that property.[133] The accounts required to be kept are generally those required by the rules governing proceedings under the *Estates Act* for the purpose of the approval or "passing" of accounts.[134]

Prior to statutory intervention, the judicial position was that the only persons entitled to the accounts and information were beneficiaries of the estate.[135] In Ontario, the entitlement to an accounting has been extended by legislation to persons interested in the property of the deceased and creditors of the deceased.[136]

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[132] Legislation bearing upon this includes the *Cemeteries Act*, *supra*, note 116, *Anatomy Act*, *supra*, note 116, and *Human Tissue Gift Act*, *supra*, note 130.

[133] Waters, *supra*, note 43, at 871-72.

[134] With respect to the passing of accounts, see *infra*, ch. 6, sec. 2(d).

[135] *Re Bosworth* (1889), 58 L.J. Ch. 432.

[136] *Estates Act*, supra, note 35, s. 75(1).

The jurisprudence is not clear with respect to what precisely must be given to the person who asks to see the accounts.[137] One question that has been raised in this regard is whether a personal representative must allow only an opportunity to inspect the accounts or must supply the requesting person with a copy of the accounts. In Ontario, the position would seem to be that the personal representative is under a duty only to afford facilities for inspection and for the beneficiary to make a copy; in special circumstances, however, the personal representative would be under a duty to supply a copy of the accounts, if requested, although the beneficiary would have to pay for such copy.[138]

The law governing the inventory constitutes the other strain of the present law relevant to the duty to disclose information. The term "inventory" has two meanings. The term is sometimes used in a wide sense to refer to the accounts of a personal representative.[139] The word is also used in a more restricted sense to mean a statement as to the property of which the deceased died possessed or to which he was entitled.[140] It is in the latter sense that the term has been employed in practice and is used here.An inventory thus does not comprehend income arising after the death of the deceased. Yet it does deal with assets owned by the deceased at the time of his death that subsequently were lost or that disappeared before the making of the inventory. The proper accounts of a personal representative should deal with the property included in an inventory in the narrow sense.

The law concerning the inventory is of ancient origin. While the position is not entirely clear, the ecclesiastical courts in England had the power to require a personal representative to exhibit an inventory.[141] The practice may have been to require an inventory to be exhibited even before probate was granted.[142] In 1529, legislation expressly required executors and administrators to exhibit inventories as part of their duty, without being called upon to to do so.[143] Apparently, the statute was not applied literally, as the practice was that personal representatives did not exhibit an inventory unless an interested person had applied for it. In exceptional cases, however, the ecclesiastical court, of its own motion, would require an inventory to be exhibited. The 1529 legislation and the relevant ecclesiastical law respecting inventories were part of the English law introduced into Upper Canada in 1792; such matters were soon administered by the surrogate courts. In 1897,

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[137] Waters, *supra*, note 43, at 872-74.

[138] *Sanford v. Porter* (1889), 10 O.A.R. 565.

[139] See Estates Rules, *supra*, note 66, r. 61. See, also, *Campbell v. Hogg*, [1930] 3 D.L.R. 673, at 684 (P.C.).

[140] See Williams, Mortimer and Sunnucks, *supra*, note 75, at 70-72.

[141] *Re Russell* (1904), 8 O.L.R. 481, at 489-90 (Div. Ct.)(*per* Meredith J.).

[142] *Phillips v. Bignell* (1811), 161 E.R. 972.

[143] 21 Hen. 8, c. 5.

personal representatives were required, prior to the application for a grant of probate or administration, to prepare an inventory in duplicate of all the property belonging to the deceased at the time of his death and to file a copy with the appropriate surrogate court.[144] In 1977, this requirement was abolished and replaced with an obligation to deliver to the registrar a true statement of the total value of all the property belonging to the deceased at the time of his death.[145]

While the preparation of a full inventory is no longer necessary prior to the grant of probate or administration, the concept of an inventory has been preserved. Section 49 of the *Estates Act* provides that "[t]he court having jurisdiction may summon any person named executor of any will to prove, or refuse to prove, such will, and to bring in inventories and to do every other thing necessary or expedient concerning the same". Section 75 also mentions an inventory of the property of the deceased.

These references clearly fit into the scheme of the former *Surrogate Courts Act* prior to 1977, since it required a personal representative to make an inventory prior to obtaining a grant of probate or administration. With the replacement of the requirement of an inventory with that of a statement of the total value of the deceased's property, the effect of the references to inventories is not entirely clear. Since it is extremely doubtful that a true statement of total value can be regarded as an inventory, it would seem that the court has been left with the power to order an inventory of its own motion.

The apparent existence of a residual jurisdiction to order an inventory makes relevant the old jurisprudence. In England, the ecclesiastical courts took an expansive view of the persons entitled to apply for an order that a personal representative render an inventory, which reflected the fact that the 1529 statute had required a personal representative to exhibit an inventory without being called upon to do so. They regarded it as sufficient if the applicant had an interest, or even the appearance of an interest in the estate.[146]

The English ecclesiastical courts established that the persons who might be compelled to exhibit an inventory were not confined to the personal representative or even to those who, upon the death of the personal representative, succeeded to the representation of the original testator. Representatives of a deceased administrator with the will annexed, who were not

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[144] *An Act respecting Executors and Administrators*, R.S.O. 1897, c. 337, s. 9.

[145] *The Surrogate Courts Amendment Act, 1977*, S.O. 1977, c. 43, s. 4. See, now, *Estates Act*, *supra*, note 35, s. 57(1).

[146] For example, an obligation to present an inventory might be found in the event of a probable or contingent interest, or if a creditor swore that certain sums were due from the deceased to him, although the debt was contested: see Williams, Mortimer and Sunnucks, *supra*, note 75, at 69.

representatives of the first testator, were required to exhibit an inventory, upon a reasonable presumption being raised that any part of the estate of the first testator had got into their hands.[147] Similarly, it has been held that even where executors of a deceased executor were not personal representatives of the original testator, they were compelled to bring in an inventory of the effects of the original testator.[148] The principle of these English cases has been applied in Ontario,[149] notwithstanding that the language of the relevant provisions of the former *Surrogate Courts Act* would not have appeared to justify such an interpretation. Indeed, in Ontario, the principle has been extended: it has been held that the personal representatives of a deceased administrator could be compelled to pass the accounts of the estate of the original intestate.[150]

Before turning to our recommendations, we shall consider the important question whether a provision in the will can affect the duty to keep records and give information. The law is not entirely clear. However, based on the obligations set out in the *Estates Act*,[151] it would seem that a provision that seeks to dispense with the duties respecting an inventory and accounts would be void. A provision limiting these duties probably would be void. Where a clause in a will provides for different duties in relation to the inventory and accounts, it would be valid if those duties supplement those imposed by the general law, but invalid if it purports to exclude or dilute these duties.

A provision in a will may purport to absolve an executor from his duty to account in relation to a specific asset. Whether it is effective depends upon the intention that is imputed to the testator. If the court interprets such a provision to indicate an intention on the part of the testator to make a beneficial gift to the executor, the executor is under no duty to keep or render accounts with respect to the administration of the asset. Although there is little authority on point, where there is such a provision in the will, but the executors are considered not to have made a beneficial gift, it seems that the provision will not be effective, and the executor will still be under the usual duties with respect to inventory and accounts.[152]

We are of the view that beneficiaries and creditors should be able to subject the conduct of estate trustees to reasonable scrutiny so that they can determine whether the estate trustee is discharging his duties properly and

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147 *Ritchie v. Rees* (1822), 162 E.R. 51.

148 *Gale v. Luttrell* (1824), 162 E.R. 279. The executors of deceased executor were not the executors of the original executor because an executor of the original executor had survived.

149 *Re French*, [1934] O.W.N. 447 (H.C.J.). See, also, *Cunnington v. Cunnington* (1901), 2 O.L.R. 511 (C.A.), and *Re Baskin*, [1954] 2 D.L.R. 748 (B.C.S.C.).

150 *Re French*, *supra*, note 149.

151 *Estates Act*, *supra*, note 35, ss. 64, 73, and 75.

152 *Re Dean* (1889), 41 Ch. D. 552.

whether their rights are being safeguarded. The existing law bearing upon the maintenance and availability of records does not sufficiently facilitate this. In some respects, the law is uncertain and difficult, which can frustrate justifiable access to crucial information about the administration of an estate. Problems of this nature can be overcome only by legislation.

We begin with the question whether estate trustees should be under an express statutory duty to maintain accounts. The existing legislation requires that personal representatives account only at the behest of others, but does not impose an obligation to keep accounts that is independent of the right of others to require that accounts be passed. While, as a practical matter, personal representatives will keep accounts, we think that the information contained in the accounts is so important that such an obligation should be made express in the legislation. Accordingly, we recommend that estate trustees should be under a statutory duty to keep accounts.

Special attention, we believe, should be given to the inventory, since it is the most fundamental of the components of the estate accounts. The inventory can assist both beneficiaries and creditors in ascertaining their positions at any given time, and it can facilitate the determination whether the estate is being properly administered. In this latter connection, we believe that the inventory should not remain a static document, but should be updated on a regular basis in order to ensure that it reflects accurately the assets of the estate at any given time. We recommend therefore that estate assets should be listed in a complete inventory, which should be kept current.[153]

With respect to the inventory, we have considered another group of potential claimants from the estate, in addition to beneficiaries and creditors, namely, persons entitled to apply for support as dependants under Part V of the *Succession Law Reform Act*. We shall shortly recommend that these persons should have access to the estate accounts, including the inventory, in order for them to ascertain whether it is appropriate to make an application for support. At this juncture, however, we wish to address one aspect of Part V. Pursuant to section 72 of the Act, the value of certain transactions made by a deceased before death is deemed to be part of the estate for the purpose of Part V of the Act. Depending on the circumstances, the transactions listed may be within the special knowledge of the estate trustee, or may come to his attention in the course of the administration of the estate. If these transactions were required to be included in the inventory of the estate, noting their peculiar nature as being part of the "net estate" of the deceased as defined by the *Succession Law Reform Act*, it would assist potential claimants under Part V in determining the extent of their rights

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[153] Under s. 57(2) of the *Estates Act*, *supra*, note 35, where property belonging to the deceased at the time of death is discovered subsequently and has not been included in the statement of total value that has been delivered to the local registrar pursuant to s. 57(1), a personal representative must deliver a new statement of total value of that property within 6 months of discovery.

and in making a decision whether it is worthwhile to assert them. This obligation, however, should be limited to the listing of the transactions enumerated in the section only insofar as they can be ascertained with reasonable effort in the normal course of administration. We therefore recommend that, where a person who comes within the definition of "dependant" in Part V of the *Succession Law Reform Act* applies to the court for access to the accounts, including the inventory, the inventory should include the transactions listed in section 72 of the *Succession Law Reform Act*. An estate trustee who is ordered to provide an inventory should be required to list only those transactions that can be ascertained with reasonable effort.

Having considered the obligation of the estate trustee to keep records, it is appropriate to consider who should be entitled to access to information, and the nature and extent of the disclosure that they should be given. Our approach to this issue is affected by the person requesting the information. We turn first to beneficiaries.

While the entitlement of beneficiaries to accounts and information is established under the present law, the scope of their right is uncertain. As we have explained, it is unclear whether personal representatives must accord them an opportunity of inspection or give them a copy of the accounts.

We have balanced our belief in the importance of ensuring reasonable access to estate records to beneficiaries against a concern that access be afforded in a manner that does not impose unnecessary or excessive costs on the estate, or expose it to the whims and caprices of unreasonable beneficiaries. We suggest that, for a beneficiary, appropriate access consists of a right of inspection of the accounts, which would include the inventory, and books and records. This would entail inspection of not only financial books and records, but all books and records in the possession or control of the estate trustee.This right should be exercisable on reasonable notice. It should include a right to obtain a copy of the accounts, books and records at the expense of the beneficiary, also exercisable on reasonable notice. We recommend that such a right should be established by legislation.

We also wish to note that, pursuant to recommendations that we will make in chapter 6,[154] dealing with the passing of accounts, interested persons, including beneficiaries, will be entitled to compel estate trustees to file their accounts with the local registrar of the Ontario Court (General Division). Following filing, estate trustees will be required to send a copy of the accounts to all interested persons, unless the court relieves them of this obligation, in which case the accounts may be inspected.

To be effective in practice, statutory recognition of the beneficiary's right of access to information must be accompanied by an expeditious enforcement procedure. At present, in the face of a recalcitrant personal

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[154] *Infra*, ch. 6, sec. 2(d).

representative, the enforcement of existing rights is frustrated by unduly cumbersome procedures. We recommend therefore that legislation should provide a summary procedure for a beneficiary to apply to the court if the estate trustee fails to afford access to the accounts, books and records. In order to ensure that estate trustees are forthcoming with information, we consider that two measures are necessary. First, we recommend that, where a beneficiary uses the summary procedure to obtain an order for disclosure, and the court orders that costs are to be awarded to the beneficiary, the court should be empowered to order that the costs be paid by the estate trustee personally. Second, we recommend that an estate trustee should be liable in damages to the beneficiary for any loss caused by a failure to comply with the statutory provisions respecting the maintenance of, and access to, accounts, books and records.

The position of creditors and persons coming within the definition of "dependant" in Part V of the *Succession Law Reform Act* should also be clarified, for they deserve a degree of access to the estate accounts in order to ensure that their interests are being protected adequately. However, they should not be given access in the same fashion as we have recommended for beneficiaries. While creditors share with beneficiaries an expectation that the estate will be properly administered to protect the value of the assets, they have an interest that is adverse to the estate and the beneficiaries. Dependants are in a position analogous to that of creditors, for they may also have a claim against the estate. We recommend that, rather than having a right of access, a person coming within the definition of "dependant" in Part V of the *Succession Law Reform Act* or a creditor whose claim has not been paid in full or in a timely fashion should be entitled to apply to the court for an order giving her such access to accounts, books and records as she can demonstrate should reasonably be made available. The court should be empowered to limit disclosure to such matters as it thinks fit.

While the right of access differs from that proposed for beneficiaries, we believe that the mechanisms for enforcement of this duty should be the same. We therefore recommend that, where an estate trustee fails to afford access to a creditor in compliance with a court order, forcing a further application by that creditor, if the court orders that costs are to be awarded to the creditor, costs are to be payable by the estate trustee personally. Second, we recommend that an estate trustee should be liable in damages to the creditor for a loss caused by a failure to comply with the court order for access. These recommendations should apply to persons coming within the definition of "dependant" in Part V of the *Succession Law Reform Act*.

We have considered whether a testator should be able to modify the duties we have recommended. This involves an examination of two questions, which approach the issue from opposite perspectives. Should a testator, by will, be able to relieve the estate trustee from the obligations imposed by legislation or the general law? Should a testator, by will, be able to impose obligations that exceed those duties? As we have indicated, the law has not settled these questions. With respect to the former question, we are of the view that a testator should not be able to dispense with the duties of

disclosure, which are intended to provide a minimum of protection for beneficiaries, creditors, and dependants. With respect to the second question, we take the view that more rigorous conditions should be respected, since the deceased may have special reasons for imposing them, relating to the attributes of the particular estate trustees and beneficiaries. It is possible, of course, that additional requirements may be capricious or unduly onerous. An estate trustee may regard them as so intolerably oppressive that she may consider renouncing her office. To deal with situations such as these it would be useful if the court were empowered to modify or relieve him of duties imposed by a testator.

Accordingly, we recommend that a testator should not be able to relieve an estate trustee of the duties respecting the maintenance of, and access to, accounts, books, and records, imposed upon him by legislation and the general law. We recommend further that a testator should be able, by will, to impose obligations that exceed those imposed by legislation and the general law, and the estate trustee should be required to comply with these duties unless the court modifies them or relieves him of them.

Our recommendations thus far have dealt with access to the accounts, books, and records in the possession or control of estate trustees. However, not all the information to which a person should be entitled may be found in these documents. The estate trustee may have information or knowledge that has not been placed in a document; for example, information about the efforts that have been made to sell assets or the actions that have been taken to enforce rights belonging to the estate may not be recorded. Valuable information respecting estate assets may be unavailable because it is in the control of persons other than the estate trustee. Indeed, the assets themselves might be in their possession.

Under the *Estates Act*, there is no mechanism by which non-documentary information can be obtained easily from reluctant estate trustees. What procedures do exist are unduly expensive and laborious, or simply ineffective. Consistent with our earlier proposals, we recommend that legislation should establish a summary procedure for beneficiaries, creditors, and persons coming within the definition of "dependant" in Part V of the *Succession Law Reform Act* that would allow them to apply to court for an order compelling the estate trustee to provide information of which he has knowledge relating to the administration of the estate where such information is not revealed in the accounts, books and records. We recommend further that, where an estate trustee fails to provide information in compliance with a court order, and in a further application the court orders that costs are to be awarded to the applicant, costs should be payable by the estate trustee personally. We also recommend that an estate trustee should be liable in damages for a loss caused to a beneficiary, creditor, or person coming within the definition of "dependant" in Part V of the *Succession Law Reform Act* by a failure to comply with the court order.

The final matter that we shall address in this section concerns information in the possession of a person other than the estate trustee. Rule 50 of

the rules governing proceedings under the *Estates Act*[155] provides that a person with knowledge of any will or other document or any asset relating or belonging to an estate may, by leave of the judge, be served with a subpoena calling upon her to attend to be examined with respect to her knowledge. The general principle embodied in this rule—that persons having information concerning estate assets should be required to divulge it—is one to which we subscribe. We believe, moreover, that this principle is of such importance that it should be implemented by statute, rather than left in regulations. Furthermore, we are of the view that the legislation should expand the information that is now required to be given under Rule 50.

Accordingly, we recommend that a statutory provision, similar to Rule 50 of the rules governing proceedings under the *Estates Act*, should be enacted to provide that, where, on the application of the estate trustee, a court is satisfied that a person has knowledge or possession of any will or other document or asset relating to or belonging to an estate, the court may order that person to attend to be examined and to provide information concerning the will, document, or asset, including the transactions set out in section 72 of the *Succession Law Reform Act*. The court should be empowered to order compensation for the work involved in providing the information.

(c) Duty to Get in the Estate

In an earlier section of this chapter, we recommended that legislation should provide that the estate trustee is to hold the estate upon certain basic trusts. Among these is the trust to get in the estate of the deceased. In stating this trust, the legislation will not be effecting any change to the existing law, but simply declaring one of the fundamental duties that has long been discharged by personal representatives.

"Getting in" the estate involves collecting or assuming control over the assets of the deceased's estate.[156] This duty requires a personal representative, and will oblige an estate trustee, actively to seek out assets and to take the necessary measures to bring them into the estate and under his control. In this regard, his task differs from that of an ordinary trustee, who is responsible only for the property that is transmitted to him by the settlor or testator.

For the most part, the present law is satisfactory. There are a few matters that warrant attention, and we shall confine our discussion to them.

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[155] *Supra*, note 66.

[156] For a discussion of what are assets of the estate, see Williams, Mortimer and Sunnucks, *supra*, note 75, at 543-58, and Widdifield, *supra*, note 102, at 9-10.

Generally, a personal representative "should get in as speedily as possible all money of his testator outstanding upon personal security only"[157] and, if necessary, should sue debtors of the estate in furtherance of this goal. Where a loss to the estate ensues as a consequence of a breach of this duty, the personal representative will be personally liable. Such will be the case, for example, where undue delay in bringing an action enables a debtor to plead the *Limitations Act*.[158] In deciding whether to sue a debtor, personal representatives have the burden of demonstrating that they have acted reasonably.[159]

The performance of the duty to get in the estate is also governed by section 48(2) of the *Trustee Act*, which empowers personal representatives to allow any time for payment of a debt, and to compromise, compound, abandon, submit to arbitration or otherwise settle any debt. It provides further that, in the exercise of this authority, the personal representative is not responsible for any loss occasioned by any act or thing done by him in good faith.[160] The effect of section 48(2) is unclear. There is authority stating that it adds nothing to the powers available at common law.[161] However, it has also been suggested that the provision might have "a revolutionary effect", insofar as it would make the question of good faith the only issue in evaluating conduct.[162] While the matter is thus not free from doubt, it would appear that section 48(2) does considerably strengthen the position of the personal representative: he will not be liable if he has acted in good faith even if he has failed to act in accordance with the standard of care normally

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[157] *Halsbury's Laws of England*, Vol. 17 (4th ed., 1976), para. 1119, at 578. By contrast, "[i]n the case of money outstanding on real security, there is no duty upon the personal representatives to realise a mortgage created by the deceased himself where the realisation is not required for a testamentary purpose, and the security itself is not in any peril:" *ibid.*

[158] R.S.O. 1980, c. 240.

[159] *McCargar v. McKinnon* (1868), 15 Gr. 361 (Ch.), and *Baldwin v. Thomas* (1868), 15 Gr. 119 (Ch.).

[160] It provides as follows:

> 48.—(2) A personal representative . . . may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of these purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient without being responsible for any loss occasioned by any act or thing done by him or them in good faith.

[161] *Re Houghton*, [1904] 1 Ch. 622, [1904-7] All E.R. Rep. 486. See, also, *Re Johnston* (1877), 25 Gr. 261 (Ch.), and *Re McGrath* (1918), 13 O.W.N. 398 (H.C. Div.).

[162] *Re Owens* (1882), 47 L.T. 61 (C.A.), at 64. See, also, *Re Earl of Strafford*, [1978] 3 All E.R. 18 (Ch. D.), at 22, where Megarry V.C. states that, in exercising a power under s. 15(f) of the *Trustee Act 1925*, *supra*, note 15, at 21, "the only criterion is whether the compromise is desirable and fair as regards all the beneficiaries". This followed from his view that the provision requires that "the trustees must act in good faith in the interests of all concerned.

required. In order to enjoy the protection of this provision, the personal representative must exercise an active discretion, and not passively fail to take proper steps to collect debts.[163] Further, it would seem that in a case where his action or inaction has been proved to have caused a loss to the estate, the burden of proving good faith would rest on the personal representative.

The powers set out in section 48(2) of the present *Trustee Act* should continue to be available to estate trustees. We are of the view, however, that the exercise of these powers should be subject to the normal duty of care to which trustees are subject, which is set out in the proposed *Trustee Act*. We can see no reason why these powers should be subject to a test of good faith alone, which would tolerate conduct of a standard that, in other contexts, would be unacceptable for an estate trustee or a trustee. We recommend, therefore, that legislation should confer on estate trustees the powers set out in section 48(2) of the *Trustee Act*, and should provide that their exercise by estate trustees is subject to the normal standard of care.

One of the most important aspects of the duty to get in the estate is the duty to bring actions on its behalf. At common law, the general rule was that causes of action that had vested in the testator were transmitted to his executors. Legislation extended this right to administrators in the fourteenth century.[164] The main exceptions to the general rule were causes of action arising out of contractual rights based upon personal considerations,[165] causes of action in tort, and causes of action arising from a breach of contract that were in substance actions for injury to the person. In such cases, the cause of action did not devolve on the personal representative.

In Ontario, section 38(1) of the *Trustee Act* modifies the common law exceptions to the general rule respecting the devolution of causes of action. It provides that, except in cases of libel and slander, a personal representative may maintain an action for all torts or injuries to the person or property of a deceased person.[166]

Section 38(1) does not extend the contractual rights of the deceased; it does not enable a personal representative to enforce an obligation that is discharged by the death of the deceased. For example, the death of a contracting party terminates contractual rights and duties where the subsistence of the rights and duties was dependent on the continuing existence of the contracting parties or any one of them. Such dependence would be the

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[163] *Re Greenwood* (1911), 105 L.T. 509 (Ch. D).

[164] Williams, Mortimer and Sunnucks, *supra*, note 75, at 489, *n.* 5.

[165] For example, an action for damages for breach of promise to marry did not survive the deceased. No action could be brought to enforce a contract of personal service under which the deceased had promised to render services to another.

[166] See *Smallman v. Moore*, [1948] S.C.R. 295, [1948] 3 D.L.R. 657, which was concerned with liability of personal representatives under s. 38(2).

case if it were indicated in the terms of the agreement or by the nature of the contract—if, for example, the contract were for the personal services of the deceased.

While no doubt the duty of estate trustees to bring actions is an integral part of the duty to get in the estate, we are of the view that it is so important that it should be made explicit in the legislation that will govern estates administration. We recommend therefore that legislation should state that it is the duty of the estate trustee to bring actions on behalf of the estate that may be brought under the common law or pursuant to section 38 of the *Trustee Act*.

Although we shall not deal with the particular means by which an estate trustee may seek to enforce obligations, there is one remedy that merits particular attention. Section 39 of the *Trustee Act* provides that "[a] personal representative has an action of account as the testator or intestate might have had if he had lived". This provision refers to the common law action of account, and does not address the more familiar accounting in equity.[167] Section 39 has its origins in medieval legislation that had been enacted to reverse the rule that a personal representative could not bring an action for account at common law with respect to matters occurring before the death of the deceased.

Once the Court of Chancery developed its own remedy of account, the common law action of account fell into disuse, as the equitable remedy was far more effective.[168] Today, all actions for an accounting are rooted in the equitable remedy, and section 39 of the *Trustee Act* has no practical importance. Accordingly, we recommend that it should be repealed.

The final matter concerns the appointment of a debtor of the deceased as estate trustee. We believe that the existing law applicable to executors and administrators presents certain difficulties that should not be continued in its application to estate trustees.

The following passage outlines the principles that apply where a debtor is named executor:[169]

> At common law an appointment by the testator of his debtor, whether he was a sole debtor or one of several joint debtors, or even one of joint and several debtors, to be his executor, operated as a release or extinguishment of the debt,

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[167] An action of account at common law, or an accounting action in equity, was a proceeding to seek "[a] detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contracts or some fiduciary relation": *Black's Law Dictionary* (5th ed., 1979), at 17.

[168] *Halsbury's Laws of England*, Vol. 34. (4th ed., 1980), para. 84, at 70.

[169] Williams, Mortimer and Sunnucks, *supra*, note 75, at 595-96.

> on the principle that a debt is merely the right to recover the amount by way of action, and as an executor could not maintain an action against himself, his appointment by the creditor to that office suspended the action for the debt; and where a personal action was once suspended by the voluntary act of the party entitled to it, it was for ever gone and discharged.[170]
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> . . .
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> As between the debtor executor and the creditors of the testator, the common law doctrine was applicable only in cases where there were assets sufficient to satisfy the testator's debts, for it would have been unfair to defraud the creditors of their just debts by a release which was absolutely voluntary. Thus the debt due from the executor was considered, on their behalf, as assets in his hands.
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> . . .
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> The effect in equity of the appointment of a debtor to the office of executor is that the debt due from the debtor executor is considered to have been paid to him by himself; and upon this supposition it is an established rule in equity that the executor should be accountable for the amount of his debt as assets. *Semble*, the debt is general assets for the payment, not only of the testator's debts, but also of his legacies.

In the case of a debtor appointed as administrator, the situation is entirely different. Since the appointment of the administrator is not a voluntary act of the deceased creditor, but a judicial act, the rule preventing revival of the action does not apply. Hence, the debt is suspended during the period of administration—as the administrator could not sue himself—but is not extinguished.[171]

One consequence of the application of different principles is that an anomaly was introduced into the law of limitations:[172]

> 3.86 The rule governing a debtor/administrator, known as the rule in *Seagram v. Knight*, provides one of the very few examples of an exception to the fundamental principle that once time begins to run it continues to run whatever may happen. . . .
>
> 3.87 In the case of the debtor/executor, the extinction of the debt prevented any question of limitation arising and in the event equity intervened by treating him as if he had paid the debt to himself, so that he became accountable for the amount of his debt as being as asset of the estate. Thus, equity effectively overrode the common law rule that the right to claim the debt was suspended. However, equity did not intervene in the case of the debtor/administrator,

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[170] At common law, the debt was extinguished even where the executor had died without having proved the will or administered the estate. In Ontario, this was reversed by legislation: see *Estates Act*, *supra*, note 35, s. 50.

[171] For a more detailed explanation, see Law Reform Committee, *Twenty-first Report (Final Report on Limitation of Actions)* (Cmnd. 6923, 1977), para. 3.86, at 54-55.

[172] *Ibid.*

whose liability was merely suspended during the period of administration; the solution adopted was to suspend the limitation period so long as the action itself was suspended.

The distinction that is drawn between executors and administrators, while understandable as a theoretical matter, is not functionally justifiable, and should not apply to estate trustees.[173] We subscribe to the general principle that the appointment of a person as estate trustee should not affect the rights of the estate against him. An estate trustee should be treated in exactly the same way as any other person who is in a legal relationship with the deceased. We therefore recommend that the present law should be changed, and that the appointment of a person as estate trustee should not extinguish or suspend a debt owed by that person to the deceased, in the absence of specific provision in the will forgiving the debt. We recommend that the estate should be able to pursue its rights against an estate trustee who is a debtor.

From this recommendation certain procedural questions arise respecting the manner in which a dispute as to the existence or the amount of the debt can be determined. In the event of litigation, the estate trustee would be both plaintiff and defendant. In the face of such an obvious conflict of interest, one solution is simply to require the estate trustee to relinquish his office. Yet, the debt may be small or inconsequential, having no effect on the administration of the estate, while substantial prejudice might be caused to the estate if an estate trustee, specifically selected by the testator to discharge certain duties, were obliged to retire. While there may be cases where removal of the estate trustee is justified—for example, where the debt owed by him constitues a major part of the estate—a rule requiring him to leave his office in all cases of conflict is too blunt a solution. We recommend that an estate trustee who it is claimed owed debts to the deceased and who disputes the existence or amount of such debts should not for that reason alone be required to retire as estate trustee. Rather, he should have his rights determined in the same manner and by the same procedure that is available to any other debtor of the deceased.

While we have proposed that the rights of the estate trustee debtor should be determined according to the procedure applicable to other debtors, we recognize that an estate trustee cannot be permitted to act on behalf of the estate as if the debt were that of a stranger. We recommend that an estate trustee should not exercise any rights or duties with respect to the determination of the existence or amount of a debt owed by him to the deceased. The estate trustee's rights or duties on behalf of the estate should be asserted by any other estate trustee who is not personally involved in the subject matter of the litigation. If there is no other estate trustee, an estate

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[173] In the United Kingdom, the limitations problem was solved by legislation that altered the law by placing the debtor who is appointed administrator in the same position as an executor who is accountable in equity to the estate for the amount of the debt: See *The Limitation Amendment Act 1980*, c. 24, s. 10, which implemented the recommendation of the Law Reform Committee, *supra*, note 171, paras. 3.92-3.93, at 56.

trustee under a limited grant should be appointed by the court for this specific purpose. Except in relation to the debt allegedly owed to the estate by him, the estate trustee's duties and powers should not be affected. However, the court should be empowered to remove the estate trustee upon application by a fellow estate trustee or an interested party.

(d) Duty to Pay Debts

Another basic trust upon which the estate trustee holds the estate of the deceased is to pay the debts of the deceased in accordance with the obligations imposed upon him by law and by the will. Numerous substantive and procedural questions relate to the satisfaction of claims against the estate. In this section, however, we shall focus on certain aspects of the duty on the estate trustee to pay debts, leaving a more detailed consideration of creditors and their claims to chapter 4.

The only legislative provision bearing upon the duty to pay debts is section 48(1) of the *Trustee Act*, which provides that "[a] personal representative may pay or allow any debt or claim on any evidence that he thinks sufficient".[174] Section 48(1) seems to enact a subjective standard, which can be met by demonstrating that the supporting evidence was considered and that it was thought to be sufficient. There is no express requirement that the evaluation of the evidence be conducted with care; if a payment has been made erroneously, owing to a negligent consideration of a claim, arguably the personal representative will not be liable for the loss, provided that section 48(1) is satisfied. Where, however, loss is incurred in payment of a purported debt or claim for a reason unconnected with the sufficiency of the evidence, it is not clear whether section 48(1) would apply. If, for example, a personal representative pays a claim in the mistaken belief that it is enforceable, he may well be liable for the resulting loss, unless relieved subsequently from liability by the court.[175]

We believe that section 48(1) of the *Trustee Act* is deficient because it appears to reduce the duty of care with respect to the payment or allowance of debts or claims. In this context, there is no reason to derogate from the fundamental principle that the performance of duties and the exercise of powers by the estate trustee should be governed by the same duty of care to which an ordinary trustee is subject. Accordingly, we recommend that the new legislation governing estates administration should confer on estate trustees the power set out in section 48(1) of the *Trustee Act* and should provide that the exercise of this power is subject to the normal standard of care.

Under the existing law, a personal representative generally should not pay a debt or allow a claim that is not enforceable against the estate. For

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[174] But see *Re Cocomile* (1985), 21 E.T.R. 113 (Ont. H.C.J.), which applied s. 48(2) in dealing with debts owed by the estate.

[175] *Trustee Act*, *supra*, note 32, s. 35.

example, a personal representative commits a *devastavit* if he pays a creditor whose debt is unenforceable by virtue of a failure to comply with the *Statute of Frauds*.[176] There is, however, a single exception to the general rule: an executor or administrator may pay a debt or allow a claim that is barred by the *Limitations Act*.[177] The courts regard this exception as an anomaly and have strictly confined its application. For example, the personal representative cannot pay a debt where a court has previously held the debt to be barred by a limitations provision.[178]

In our view, as a matter of general principle, there is no justification for the exception allowing a personal representative a discretion to pay or allow a claim barred by the *Limitations Act* or any other limitations provision. Debts that are unenforceable due to the *Statute of Frauds* cannot be distinguished from debts that are rendered unenforceable by a limitations provision. Where, however, a testator directs that a statute-barred debt should be paid by an estate trustee, there is no public policy reason to depart from the ordinary principle that effect should be given to the expressed wishes of the testator. We therefore recommend that estate trustees should have no discretion to pay a debt or allow a claim that is barred by the *Limitations Act* or any other limitations provision, in the absence of a specific direction in the will authorizing him to pay the debt or allow the claim.[179]

Permitting the testator to authorize the estate trustee to pay a statute-barred debt raises a collateral issue as to the characterization of the authorization. Should it be treated as being in the nature of a legacy or as a debt? This question is important where the estate is insolvent. If the creditor whose debt is barred by statute is treated like other creditors, he will share with them *pro rata* in whatever assets are available; if he is treated like a beneficiary, he will receive nothing.

In our view, in the situation where a testator authorizes the payment of a statute-barred debt, the elements of a debtor-creditor relationship predominate. A moral obligation may be said to exist where money has been advanced to the testator on the understanding that it would be repaid at some time in the future. On this basis, a distinction should be drawn between creditors who have advanced funds and beneficiaries who are merely volunteers, and the position of the latter should be subordinated to that of the former.

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[176] R.S.O. 1980, c. 481.

[177] Williams, Mortimer and Sunnucks, *supra*, note 75, at 715, and Widdifield, *supra*, note 102, at 60-61.

[178] *Midgley v. Midgley*, [1893] 3 Ch. 282 (C.A.), and *Re Rownson* (1885), 29 Ch. D. 358 (C.A.).

[179] In the *Report on Limitation of Actions*, *supra*, note 44, at 128, the Commission was opposed to the principle that an executor may pay a statute-barred debt, including a debt owed by the estate to herself. The Commission concluded that the right of an executor to pay this debt should be extinguished, stating that there is "no good reason why a statute-barred creditor should benefit at the expense of the beneficiaries under the will" (*ibid.*).The Commission, however, did not consider the question whether such a debt may be paid pursuant to a direction in the will of the testator.

While we have concluded that the creditor whose debt is statute-barred should be treated as a creditor rather than as a beneficiary, we believe that he should not be treated exactly like other creditors. His claim should rank below their claims because, but for the authorization in the will, his claim would be unenforceable. Accordingly, we recommend that, where the testator authorizes payment of a debt barred by the *Limitations Act* or any other limitations provision, that debt should not be paid until all the other debts of the deceased have been paid in full, but should be paid in full in priority to payments or gifts to the beneficiaries of the deceased.

The final issue that we shall consider in connection with the estate trustee's duty to pay debts is the converse of an issue that we examined in the previous section: how should the law deal with the situation where the estate trustee is owed a debt by the deceased? Since, under the present law, an executor cannot bring proceedings in his personal capacity against himself as executor, he cannot enforce by action a debt owed to him by the deceased. Moreover, where a creditor is appointed sole executor of the deceased debtor, the debt is extinguished if the executor has sufficient assets of the deceased in his possession that he could retain for the payment of his debt.[180]

The same general principle applies where the creditor is appointed as one of two or more executors: generally, a creditor-executor cannot sue a co-executor in respect of a debt owed to him by the deceased.[181] Where, however, a creditor of the deceased is appointed executor, but neither proves the will nor acts as executor, he can sue the other executors in respect of the debt.[182]

An administrator, like an executor, cannot bring an action in his personal right against himself as administrator.[183]

As a consequence of the inability of the personal representative to sue the estate, he was given the interdependent rights of retainer and preference, which allowed him to retain out of the assets of the estate in his possession the amount of his debt.[184] The right of retainer was conferred to overcome a hardship to personal representatives caused by the fact that judgment creditors once had priority over other creditors, and the personal representative was unable to convert his debt into a judgment debt in order to secure

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[180] Williams, Mortimer and Sunnucks, *supra*, note 75, at 598.

[181] *Ibid.*

[182] *Ibid.*

[183] Williams, Mortimer and Sunnucks, *ibid.*, state that, "a creditor who has taken out letters of administration to his debtor can successfully sue a person who has intermeddled in the deceased's affairs as executor *de son tort*, provided he can prove that he, the creditor administrator, has no assets to satisfy his debt".

[184] For a discussion of the law in England prior to the abolition of these rights, see Sunnucks, *Williams and Mortimer on Executors, Administrators and Probate* (1970) (hereinafter referred to as "Williams and Mortimer"), at 701-09. For a discussion of the present law, see Williams, Mortimer and Sunnucks, *supra*, note 75, at 587-88.

this priority.[185] By exercising his right of retainer, a personal representative could prefer his own debt to those of other creditors of equal degree. In addition, a personal representative was entitled to retain for a statute-barred debt.[186]

The right of retainer does not compensate the personal representative completely for the disadvantage suffered by reason of his inability to sue the estate. He may retain only for debts and other claims that are in the nature of debts, in that the claims are quantifiable by reference to a "certain standard or measure".[187] An amount that would represent damages in tort, for example, may not be retained.[188]

For the most part, these principles remain unaffected by legislation.[189] The only change has been effected by section 50(1) of the *Trustee Act*, which abolishes the personal representative's right by retainer to prefer his own debt to the debts and claims of other creditors. Personal representatives may still retain assets for a statute-barred debt.

When we considered the collection of debts owed by the estate trustee to the deceased, we began with the principle that the appointment of a person as estate trustee of the deceased should not affect his legal relationship to the deceased and the estate. We believe that this principle is generally applicable in this context. If the estate trustee is to be placed on an equal footing with other creditors, this would demand abolition of the right of retainer, including the right to retain with respect to statute-barred debts. After giving this matter very careful consideration, we have come to the conclusion that, on balance, the right of retainer should be abolished in part only. Total abolition in effect would require a determination by litigation of every debt owed by the deceased to an estate trustee, even where the existence and amount of the debt are not in dispute. This would not only unnecessarily disrupt the administration of the estate, but may discourage the participation of non-professional estate trustees.[190] Hence, the law should preserve that aspect of the law of retainer that allows an estate trustee to pay to himself an undisputed debt owed to him by the deceased.

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185 Williams and Mortimer, *supra*, note 184, at 703, and The Law Commission, *Administration Bonds, Personal Representatives' Right of Retainer and Preference andRelated Matters* (Law Com. No. 31, 1970), para. 8, at 4.

186 A personal representative could not retain a debt that is unenforceable by reason of a failure to comply with the *Statute of Frauds*, R.S.O. 1980, c. 481, or s. 4 of the *Sale of Goods Act*:, R.S.O. 1980, c. 462: Williams and Mortimer, *supra*, note 184, at 706.

187 *Re Compton* (1885), 30 Ch. D. 15 (C.A.), at 21.

188 Williams and Mortimer, *supra*, note 184, at 705-06.

189 *Public Trustee v. Guaranty Trust Co. of Canada*, [1980] 2 S.C.R. 931, 115 D.L.R. (3d) 513, aff'g (1979), 24 O.R. (2d) 634, 99 D.L.R (3d) 574 (C.A.).

190 See Williams, Mortimer and Sunnucks, *supra*, note 75, at 588, where it is submitted that, among several reasons for opposing abolition of retainer and preference, "it may be desirable as a matter of public policy to avoid further discouragement of lay volunteers from accepting duties which are already burdensome and unrewarding."

However, consistent with our earlier recommendation that estate trustees should have no discretion to pay a statute-barred debt, in the absence of a direction in the will, we favour abolition of the right of retainer in connection with such debts. The present right to retain for statute-barred debts gives personal representatives an advantage over other creditors of the deceased, who suffer by reason of their failure to bring proceedings within the prescribed limitation period. We cannot see that the mere fact of becoming a personal representative entitles them to this special benefit. Where an executor is appointed by a testator, it is extremely doubtful that the appointment was intended to allow the executor to recover the amount of the debt. In the case of an administrator, the fortuitousness of this exception is even more pronounced. In both cases, the personal representative is in a better position than he would have been had the deceased not died.

Accordingly, we recommend that the estate trustee should have the same right to recover a debt from the estate as any other creditor. We recommend further that, while estate trustees should continue to have the right of retainer with respect to non-contentious debts, they should have no priority over other creditors of the estate. However, in the absence of an authorization in the will, estate trustees should not be able to retain for a statute-barred debt.

Our recommendation to allow an estate trustee who is a creditor to pursue his claims against the estate raises the same procedural questions that were examined in the previous section. For the reasons that we stated in that section, we would adopt those proposals in this context. Accordingly, we recommend that, where an estate trustee claims to be owed debts by the deceased, and there is a dispute as to the existence or amount of the debt, or both, the estate trustee should not for that reason alone be required to retire. Rather, he should have his rights determined in the same manner and by the same procedure that is available to any other creditor of the deceased. We recommend further that an estate trustee should not exercise any rights or duties with respect to the determination of the existence or amount of a debt owed to him by the deceased. The estate trustee's rights or duties on behalf of the estate should be asserted by any other estate trustee who is not personally involved in the subject matter of the litigation. If there is no other estate trustee, an estate trustee should be appointed by the court for this specific purpose. Except in relation to the debt allegedly owed to him by the estate, the estate trustee's duties and powers should not be affected. However, the court should be empowered to remove the estate trustee upon application by a fellow estate trustee or an interested party.

(e) Administrative and Other Powers

In the previous section, we discussed certain duties associated with representation of deceased persons; in this section we consider various administrative and other powers. It may appear that our basic recommendation that the estate trustee should have all the powers and duties of an

ordinary trustee[191] would settle this issue, removing the need for further discussion. However, since there is a distinction in function between estate trustees and ordinary trustees, it is appropriate to ask whether they should be subject to the same duties and have the same powers in every respect.

Under the existing law, it appears that trustees and personal representatives do share certain powers in common. As we have explained, under the *Trustee Act*, "trustee" is effectively defined to include a personal representative.[192]

We do not propose to review each of the powers that we have recommended should be given to a trustee in the *Report on the Law of Trusts*. There are areas of the law where a distinction has been drawn historically between personal representatives and trustees, and consideration should be given to whether the distinction should continue as an exception to our general recommendation in favour of assimilating the two offices. There are also powers in relation to which the difference in function between estate trustees and ordinary trustees requires either comment or modification. We shall confine our discussion to these powers.

In the *Report on the Law of Trusts*, we considered two general categories of power that may be conferred upon a trustee: administrative powers and dispositive powers. Administrative powers relate to the management by the trustee of the trust assets on behalf of others according to the authority conferred on him by the trust instrument or by statute. A dispositive power, or power of distribution, is an authority to allocate trust property to a beneficiary or a class of beneficiaries.

In this chapter, we focus primarily on certain administrative powers. It is important to note that all of these powers must be exercised subject to the five basic duties or "trusts" under which the estate trustee holds the deceased's property. It will be recalled that these trusts are to exercise the powers conferred on him by law and by the will, to carry out the obligations imposed on him by law and by the will, to get in the estate of the deceased, to pay the debts of the deceased in accordance with the obligations imposed on him by law and by the will, and to distribute the estate of the deceased in accordance with the law and the will.

Finally, it bears emphasizing that, in the proposed *Trustee Act*, the exercise of administrative powers, including the power of investment, is

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[191] We have addressed in some detail the powers to be granted to trustees under the revised *Trustee Act* in the *Report on the Law of Trusts*, *supra*, note 3. While we shall refer to the earlier report, readers should consult it for a fuller discussion of the recommendations pertaining to trustees, and their supporting reasoning.

[192] Section 1(q) of the *Trustee Act*, *supra*, note 32, states that " 'trust' . . . extends to and includes the duties incident to the office of personal representative of a deceased person, and 'trustee' has a corresponding meaning".

expressly made subject to the duty of care to which trustees are generally subject in the discharge of their duties and the exercise of their powers.

(i) Administrative Powers

a. Investment

Under existing Ontario law, it would appear that the power of investment of a personal representative is identical to that of a trustee. This power, however, must be exercised in light of the basic function of a personal representative, which differs from that of a trustee. The task of the personal representative is to "wind up" the estate of the deceased by gathering in the assets of the deceased, paying funeral and testamentary expenses and outstanding debts, and distributing the remaining assets among the persons lawfully entitled thereto. Investment decisions should reflect the fact that this entire process is to be completed within a relatively short period. By contrast, the responsibility of a trustee for the administration of a trust almost invariably extends for a much longer duration and the exercise of his power to invest must be exercised accordingly.

In the *Report on the Law of Trusts*, we considered the trustee's powers of investment at length, and we do not propose to recapitulate that discussion, except to recount our recommendations. It was our view that the "legal list" approach to trustee investment,[193] which has long been a feature of trustee legislation in England, Canada, and Australia, should be abandoned in favour of the "prudent person" concept. Accordingly, we recommended that sections 26 and 27 of the Ontario *Trustee Act* should be repealed and, in their place, the revised Act should adopt a version of this concept for trustee investment powers. We recommended that the power of investment should be governed by the basic duty of care proposed for the revised *Trustee Act*. The proposed standard is that, in the discharge of their duties and the exercise of their powers, whether the duty or power is created by law or the trust instrument, trustees shall exercise that degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.[194]

We further recommended that subject to this basic duty of care and the terms of the trust instrument, trustees should be able to invest trust money in any kind of property. Finally, we recommended a list of criteria that trustees may consult when making investment decisions.[195]

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[193] The legal list approach allows trustees to invest only in certain kinds of securities, which are listed in the governing legislation, unless the trust instrument provides otherwise. See, generally, Trusts Report, *supra*, note 3, at 187-222.

[194] *Ibid.*, at 219-22.

[195] *Ibid.*, at 219-21. See Draft Trustee Bill, s. 34.

We believe that the approach that we have taken to the exercise of trustee investment powers is equally appropriate for the exercise of these powers by estate trustees. However, as we have already stated, the standards governing the exercise of these powers should be interpreted in light of the basic difference in function between estate trustees and ordinary trustees. Indeed, we have earlier recommended that the exercise of powers by estate trustees should be subject to, and guided by, the fulfilment of five basic trusts or duties unique to estate trustees. Thus, the duty of care of an estate trustee may reflect factors different from those applicable to an ordinary trustee. Accordingly, we recommend that the power of investment of estate trustees should be identical to that of trustees under the proposed revised *Trustee Act*.

b. Leasing

(1) As Lessee

The Ontario *Trustee Act* authorizes trustees, where trust assets include leasehold property, to renew the lease and, for that purpose, to raise money by way of a mortgage of the lease.[196] In the *Report on the Law of Trusts*, we took the view that a general power to renew leases held by the trust should be available, and therefore recommended that trustees, as lessees, should be able to renew a lease held by the trust.[197] We believe that estate trustees should enjoy an identical power, and we so recommend.

(2) As Lessor

At common law, personal representatives had a limited power to grant leases.[198] In Ontario, legislation has conferred a restricted power of leasing, which supplements the common law power and whatever power of leasing is given under the will. Section 21(1)(a) and (b) of the *Estates Administration Act* provides that the powers of a personal representative under that Act include the power to lease from year to year while the real property remains vested in him, and the power, with the approval of the majority of the beneficiaries, to lease for a longer term.[199]

In the *Report on the Law of Trusts*, we recommended that the revised Act should contain a provision to the effect that trustees may, as lessors, grant or renew a lease or sublease of trust property for a term not exceeding,

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196 *Trustee Act*, *supra*, note 32, s. 22.

197 Trusts Report, *supra*, note 3, at 241, and Draft Trustee Bill, s. 35(d).

198 Williams, Mortimer and Sunnucks, *supra*, note 75, at 664.

199 Under this provision, the Official Guardian must act on behalf of a minor or a mentally incompetent person. See, also, *Trustee Act*, *supra*, note 32, ss. 41-42. In addition, among the powers conferred on the court by the *Settled Estates Act*, R.S.O. 1980, c. 468, is the power to authorize leases of land subject to the Act.

in the case of residential property, three years, or, in the case of any other type of property, seven years, or with the consent of the court, grant or renew a lease or sublease of trust property for longer periods or grant an option to renew the lease or sublease or to purchase the reversion.[200]

As a matter of principle, we believe that estate trustees should have the same power of leasing that we have proposed for ordinary trustees. Moreover, it is our view that the requirement in the *Estates Administration Act* that a majority of beneficiaries approve a lease of a term longer than one year is philosophically inconsistent with the approach taken in this report to the power of sale, the exercise of which, we shall recommend, should no longer be subject to the concurrence of beneficiaries.[201]

We are aware that the conferral of such a wide power on estate trustees may raise concerns whether the exercise of this power may result in the estate being encumbered with a long lease, perhaps contrary to the wishes of the beneficiaries to whom the estate is devised. We are confident, however, that our basic recommendation to render the exercise of the powers of the estate trustee subject to the five fundamental trusts or duties should meet this concern.

Accordingly, we recommend that section 21(1)(a) and 21(1)(b) of the *Estates Administration Act* should be repealed, and that the power of an estate trustee to grant or renew a lease or sublease of estate property should be identical to that of a trustee in relation to trust property under the revised *Trustee Act*.

c. Management, Maintenance and Repair

In the absence of an express provision in the will, it appears that a personal representative does not have a general power to expend estate money to repair or improve estate property. Such a power is neither recognized by the courts nor conferred by statute.[202]

The relevant case law has not addressed this question directly, but has been concerned with tangential issues. While most of the cases deal with trustees, rather than personal representatives, it seems that the law is substantially the same in its application to both offices. There has been a recognition that the court has a very limited inherent jurisdiction to authorize

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[200] Trusts Report, *supra*, note 3, at 241-42, and Draft Trustee Bill, s. 35(e).

[201] *Infra.*, ch. 5, sec. 4(b).

[202] The *Settled Estates Act*, *supra*, note 199, and the *Variation of Trusts Act*, R.S.O. 1980, c. 519, grant a very limited power that is subject to court approval. Section 13 of the *Settled Lands Act* gives the court power to authorize a mortgage of the whole or any part of settled estate under the Act for the purpose of raising money to repair, rebuild or alter any existing building upon the estate, or otherwise build upon or improve the same. Under the *Variation of Trusts Act*, the court has jurisdiction to approve an arrangement with respect to the repair or improvement of trust property.

trustees, who otherwise would lack the necessary power, to expend trust money to effect repairs.[203] There are cases bearing on whether a personal representative is entitled to an indemnity because he has spent his own money on repairs and improvements; however, the cases are divided and the position is unclear.[204]

We believe that estate trustees should be given a power of maintenance and repair that will allow them to preserve the estate property. In the *Report on the Law of Trusts*, we recommended that the revised *Trustee Act* should provide that trustees may manage, maintain, repair, renovate, improve, or develop trust property, including in the case of land subdividing, erecting buildings, dedicating for any public purpose, granting easements, *profits à prendre*, or licences, and entering into agreements with respect to boundaries, party walls, fencing, or other matters in connection with trust property.[205] It is our recommendation that an estate trustee should have the same power.

Because some of the powers that we have proposed for ordinary trustees go considerably beyond the powers necessary for the preservation of the estate, and may seem inconsistent with the shorter duration of the duties of an estate trustee, our decision warrants further explanation. We begin with our fundamental assumption that the powers of the estate trustee should be assimilated, as much as possible, to those of ordinary trustees. A second consideration is that it often is a difficult question whether a particular activity should be classified as keeping the estate in repair or making improvements, and we do not wish to require estate trustees, and perhaps, ultimately courts, to engage in an unnecessary definitional exercise that might lead to continuing uncertainty. Finally, we wish to re-emphasize that these powers, like all powers of the estate trustee, must be exercised subject to the fundamental trusts that we have proposed.

d. Insurance

In Ontario, the duty to insure forms part of the general duty of personal representatives and trustees to preserve the assets of the estate.[206] Section 21 of the *Trustee Act* confers upon trustees a specific power to insure trust property, and provides, in part,[207] as follows:

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[203] The court's inherent jurisdiction has been restricted to what has been called "salvage". This jurisdiction is limited by 2 factors. First, it must be necessary for the good of the trust or estate that the transaction in question be effected. Second, the circumstances that gave rise to the necessity must not be anticipated by the settlor or testator: see *Crocker v. Tomroos*, [1957] S.C.R. 151, 7 D.L.R. (2d) 104. See, also, *Re Montagu*, [1897] 2 Ch. 8 (C.A.); and *Re New*, [1901] 2 Ch. 534, [1900-3] All E.R. Rep. 763 (C.A.).

[204] Compare *Bevis v. Boulton* (1858), 7 Gr. 39 and *Conway v. Fenton* (1888), 40 Ch. D. 512 with *Re Brazill* (1865), 11 Gr. 253 and *Re Winchester* (1960), 32 W.W.R. 224, 26 D.L.R. (2d) 205 (Alta. S.C., Trial Div.).

[205] Trusts Report, *supra*, note 3, at 242, and Draft Trustee Bill, s. 35(f).

[206] *Re Gamble* (1925), 57 O.L.R. 504, [1925] 4 D.L.R. 768 (H.C. Div.).

[207] It further authorizes the payment of premiums out of the income of trust property.

> 21.—(1) A trustee may insure against loss or damage by fire, tempest or other casualty, any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three-fourths of the value of such building or property. . . .
>
> (2) This section does not apply to any building or property that a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

Under section 21(1), there is no power to insure against public liability, and there is no power to insure to an amount exceeding three-fourths of the value of the property.

When we considered the power to insure in the *Report on the Law of Trusts*, we took the view that a specific power should be included in the statutory list of administrative powers. However, we believed that the limitations set by section 21 of the *Trustee Act* were inappropriate and that the power to insure should be conferred without qualification. We recommended therefore that the revised Act should provide that trustees may insure against loss or damage to trust property and against any other risk or liability.[208]

As a matter of principle, the power of estate trustees to insure should be identical to that of trustees under the proposed *Trustee Act*, and we so recommend.

e. Carrying on Business

The issue whether a personal representative has power to carry on an existing business of the deceased is not addressed directly by statute in Ontario, but is governed by judicial decision.

The general rule is that personal representatives do not have a general power to carry on a business of the deceased.[209] While it has been said that, in order to authorize executors to carry on a business, "there ought to be the most distinct and positive authority and direction given by the will itself for that purpose,"[210] courts have been prepared to imply such a power in its absence.[211] Moreover, even in the absence of a direction in the will, a personal representative may carry on the business "for such reasonable time

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[208] Trusts Report, *supra*, note 3, at 243, and Draft Trustee Bill, s. 35(q).

[209] Williams, Mortimer and Sunnucks, *supra*, note 75, at 702.

[210] *Kirkman v. Booth* (1848), 50 E.R. 821 (Ch. D.), at 824.

[211] In particular, it has been held that conferral of a power to postpone the sale and conversion of the estate authorizes the executor to carry on a business of the testator until the time for distribution: see *Re Crowther*, [1895] 2 Ch. 56; *Re Ball*, [1930] W.N. 111 (Ch. D.); and *Re Gilmour*, [1936] O.W.N 1 (C.A.). Compare *Re Smith*, [1896] 1 Ch. 171, [1895-9] All E.R. Rep. 1175.

as might be necessary to enable him to sell it to the best advantage of the estate".[212]

Where there is a power to carry on the business, its exercise is subject to certain constraints. A personal representative can properly employ only those assets authorized by the testator to be used in carrying on the business.[213] In the absence of a direction respecting the assets to be employed in the business, there is no power to invest capital of the estate in the business, other than that which remained in the business at the death of the testator.[214] In order to secure the borrowing of money for the purposes of a business, a personal representative may charge only assets expressly or impliedly authorized to be used in the business, but has no power to charge other assets of the estate.[215] Finally, it would appear that, where there is express authority to carry on a business, it would comprehend a power to incorporate the business.[216]

We believe that the power of an estate trustee to carry on a business should be clarified. When we considered this issue in the *Report on the Law of Trusts*, we recommended that the revised Act should contain a provision to the effect that trustees may carry on any business, whether as sole proprietor, partner, limited partner or otherwise, and may incorporate or otherwise change the form of the business, and dispose of or wind up the business.[217]

The power that we recommended for trustees is very broad and we have considered whether such a power would be inconsistent with the basic "winding-up" function of the estate trustee. As a matter of principle, we are of the view that, while an estate trustee should be empowered to continue a business, she should not be able to commence a new business.Nor would we wish to see estate trustees carrying on the business of a deceased where the proper course would be to wind it up.

These concerns do not call for us to depart from the recommendation that we made for trustees. For example, the power to start a new business is not comprehended by the proposal that we have made in the Trusts

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[212] Williams, Mortimer and Sunnucks, *supra*, note 75, at 703. See, also, *Union Bank v. Clark* (1910), 43 S.C.R. 299.

[213] *Thompson v. Andrews* (1832), 39 E.R. 625, and *Cutbush v. Cutbush* (1839), 48 E.R. 910.

[214] *M'Neillie v. Acton* (1853), 43 E.R. 699; *Smith v. Smith* (1867), 13 Gr. 81 (Ch.); and *Re Bucovetsky*, [1942] O.W.N. 618, [1943] 1 D.L.R. 208 (H.C.J.).

[215] *Re Dimmock* (1885), 52 L.T. 494 (Ch. D.); *M'Neillie v. Acton*, *supra*, note 214, *Smith v. Smith*, *supra*, note 214. But see *Union Bank v. Clark*, *supra*, note 212, and *Bank of Montreal v. Morrow* (1936), 50 B.C.R. 540, [1936] 4 D.L.R. 331 (B.C.C.A.).

[216] Williams, Mortimer and Sunnucks, *supra*, note 75, at 704, states that "[w]here executors are expressly authorized to carry on a business, they probably have power to convert the business into a private limited company having the same assets and management as the business." But see *Halsburys' Laws of England*, Vol. 17 (4th ed., 1976), para. 1213, at 626.

[217] Trusts Report, *supra*, note 3, at 243-44, and Draft Trustee Bill, s. 35(h).

Report. There may be circumstances where it is advantageous to the estate for a business of the deceased to be continued for a purpose other than to enable it to be sold to the best advantage. As with all the powers of an estate trustee, the power to carry on a business is not immune from control: it would be subject to exclusion, modification or limitation by the testator in his will. Moreover, in deciding whether, and how, to exercise this power, the estate trustee would be subject to the general duty of care and prudence. Finally, and perhaps more importantly in light of the concerns that we have raised, the exercise of this power would be subject to the fundamental duties or trusts imposed on estate trustees and, in particular, the duty to get in the assets of the estate and the duty to distribute the estate of the deceased among those beneficially entitled thereto. We therefore recommend that the estate trustee should have a power to carry on an existing business identical to the power given to a trustee under the proposed *Trustee Act*.

f. Surrender of Property

In the *Report on the Law of Trusts*, we recommended that the revised *Trustee Act* should provide that trustees may surrender insurance policies, leases or other trust property that is subject to onerous obligations of such a nature that it would not be in the interests of the beneficiaries to retain that property.[218] While personal representatives may enjoy such a power under the present law,[219] we believe that it should be made clear by statute that the estate trustee does indeed possess it. We therefore recommend that the estate trustee should have the same power to surrender property that is conferred on ordinary trustees under the proposed *Trustee Act*.

g. Acquisition of a Dwelling Home

There may be situations where it would be necessary to provide living accommodation for a beneficiary of an estate, although the relatively transitory nature of an estate renders this a less likely possibility than in the case of a trust. At present, it would appear that personal representatives lack this power. The Ontario *Trustee Act* does not permit trustees to rent, purchase, or build a house for the use of a beneficiary.[220]

In the *Report on the Law of Trusts*, we recommended that the revised Act should provide that trustees may purchase or rent living accommodation,

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[218] Trusts Report, *supra*, note 3, at 245, and Draft Trustee Bill, s. 35 (*j*).

[219] Williams, Mortimer and Sunnucks, *supra*, note 75, at 712, state that "if the rent is greater than the yearly value of the land, and the testator was the assignee of the term, the executor may be guilty of a *devastavit* in neglecting to exonerate the estate of the testator from its liabilities under the lease by assigning it, where permissible, to some other person".

[220] It is very unlikely that the power of investment comprehends the power to acquire a dwelling house for a beneficiary. There is English authority holding that a power to invest in land does not authorize the purchase of land for use as a beneficiary's home, as the land would not produce income: see *Re Power*, [1947] 1 Ch. 572, [1947] 2 All E.R. 282.

or construct a house on land held by them, for the purpose of providing a home for the person entitled to the income of the money expended in respect of the purchase, or to the income to be expended in respect of the rent, or to the income of either the land or the money expended in respect of the purchase or construction, if the person for whom the living accommodation is provided consents thereto.[221]

We believe that an identical power should be given to estate trustees, and we so recommend.

h. Borrowing Money

The existing law respecting the power of a personal representative to borrow money and to give security for a loan is uncertain. Particularly complex and confusing is the law governing the power to mortgage assets of the estate.

Turning first to the power to borrow, a personal representative has always had power to borrow money for payment of debts and other purposes of administration. While there appears to be no authority, it would appear that the personal representative could either repay the loan out of the assets of the estate or repay the loan himself and then reimburse himself out of the assets of the estate.[222]

The complexity of the present law relating to the power to mortgage estate assets is attributable to the fact that it draws upon various discrete sources. The common law power of mortgaging was exercisable only in respect of the property vested in the personal representative.[223] At common law, only personalty, including leaseholds, vested in the personal representatives. The real property of the deceased did not vest in the personal representatives; it vested directly in his heir or devisee and, at common law, it was subject only to the claims of creditors either by judgment or by specialty. The courts of equity, however, took the view that a devise or appointment of real property held in trust for payment of debts, or subject to or charged with debts, created an enforceable trust in favour of creditors, and that the trust would be executed by the mortgage or sale of the realty and the payment

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[221] Trusts Report, *supra*, note 3, at 245-46, and Draft Trustee Bill, s. 35(k).

[222] See, now, *Trustee Act*, *supra*, note 32, s. 33, which provides that a trustee "may reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust or powers".

[223] Williams, Mortimer and Sunnucks, *supra*, note 75, at 663, explain as follows:

> Even at common law, unless the will peremptorily required an absolute sale, the executor could raise any money required for administration purposes by a partial sale or mortgage of the assets vested in him. The mortgage might have been either of legal or equitable assets, or of a mere *chose in action*, it might have been by actual assignment or by deposit, and might properly have given the mortgagee a power of sale. Again, the executor might pledge a part of the assets to enable him to administer the estate.

of all creditors, *pari passu*, out of the proceeds. Where such real property was devised to executors, they had the power of mortgaging, even apart from any provision in the will to that effect.[224] Moreover, where there was a direction in the will to pay the debts and the real estate was devised to executors, the debts were ordinarily treated as being charged on the real estate so that, in this situation, the personal representatives would also have a power to mortgage the real estate.[225]

The position of a mortgagee at common law has been summarized as follows:[226]

> 1. A personal representative purporting to act for administration purposes only would generally confer a good title upon a person in whose favour he made a transfer or conveyance of the legal estate.
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> 2. A personal representative selling or mortgaging part of the deceased's estate was presumed to be acting in discharge of the duties imposed upon him as such representative, unless there was something in the transaction showing the contrary; and the contrary was not made out merely from the fact that the conveyance or mortgage did not purport to be made by him in that capacity. . . .
>
> 3. A mortgage made by a personal representative, known to be such, for a purpose other than administration, would be set aside as against a mortgagee having notice of the purpose for which the money was raised. Thus a mortgagee having actual notice that there were no debts, and no reason being suggested for the mortgage, was not safe in lending.

The power to mortgage land has been addressed by legislation. Section 41 of the *Trustee Act* provides that, where there is in a will an express or implied direction, *inter alia*, to mortgage or encumber any land, and no person, by the will or otherwise, is appointed by the testator to carry it into effect, an executor named in the will is empowered to do it. Section 42 provides that, under the same circumstances, a power to mortgage or encumber land may be exercised by an administrator with the will annexed who has given security for his dealing with the land and its proceeds.

Section 44(1) of the *Trustee Act* provides that, where a testator charges land with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises it to his executors or to a trustee without any express provision for the raising of the debt, legacy or sum of money out of the land, the devisee may raise the debt, legacy or money by

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[224] Where the land was devised to executors charged with the payment of legacies (and not debts), in the absence of provision in the will, the executors had power to mortgage in only the limited sense that they had the legal estate and could convey it. The conveyance would be subject to the claims of the legatees: see *Stroughill v. Anstey* (1852), 42 E.R. 700, and *Re Rebbeck* (1894), 38 S.J. 399 (Ch.D). This has been changed by s. 44(1) of the *Trustee Act*.

[225] Armour, "Sales by Executors and Administrators", [1927] 4 D.L.R. 753.

[226] Williams, Mortimer and Sunnucks, *supra*, note 75, at 669-70.

a sale or mortgage of all or part of the land. Section 44(2) provides that purchasers or mortgagees are not bound to inquire whether any of the powers conferred by section 44(1) have been duly and correctly exercised by the person "acting in virtue thereof".

Section 21(1)(c) of the *Estates Administration Act* provides that the powers of a personal representative include the "power to mortgage for the payment of debts". Section 21(2) requires the written approval of the Official Guardian for mortgaging where it would be required if the real property were sold.[227] The power conferred by section 21 is in addition to the powers given under the will or pursuant to the common law and the *Trustee Act*.

Certain limitations attend the exercise of this power under the *Estates Administration Act*. It can be exercised only where the real property is vested in the personal representative. Consequently, the power cannot be used once the real property, pursuant to section 9 of the *Estates Administration Act*, vests in the persons beneficially entitled to it.[228] Furthermore, the *Estates Administration Act* does not provide specifically for the protection of the mortgagee where the personal representative purports to exercise the power under section 21.[229]

From the foregoing summary, it is apparent that the existing law is complex and confusing. In the *Report on the Law of Trusts*, we took the view that trustees should be given a general borrowing power. Consequently, we recommended that the revised Act should provide that trustees may borrow money, and, as security, may mortgage, pledge, or otherwise charge any of the trust property.[230] We have considered whether this power should be

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[227] Arguably, s. 21(2) has no effect. Section 15(1) of the *Estates Administration Act*, *supra*, note 28, provides that, where minors are interested in real property, sale or conveyance of the property is not valid without the written approval of the Official Guardian or an order of a judge. However, it has been held that s. 15(1) must be read subject to s. 17(1) and that the consent of the Official Guardian is not required for a sale for the purpose of paying debts: *Re Watson and Major*, [1943] O.W.N. 696 (H.C.J.). Hence, if the real property is mortgaged for the purpose of paying debts, the approval of the Official Guardian is not required, since it would not be required if the real property were sold.

[228] For a discussion of s. 9 of the *Estates Administration Act* and "automatic vesting", see *infra*, ch. 5, sec. 3(a).

[229] By contrast, s. 19 of the *Estates Administration Act*, *supra*, note 28, protects a person purchasing in good faith and for value real property from a personal representative in a manner authorized by the Act. It could be argued that this provision is capable of extending to mortgagees. The words "purchase" and "purchaser" have a technical meaning, which includes "mortgage" and "mortgagee" respectively: see, for example, Megarry and Wade, *The Law of Real Property* (4th ed., 1975), at 116, and *Black's Law Dictionary*, *supra*, note 167, at 1110-11. Moreover, the term "purchase money" is arguably capable of including money paid on the security of a mortgage. Finally, there is no reason why a mortgagee should not enjoy the protection conferred by s. 19 on other purchasers. The position, however, remains unclear.

[230] Trusts Report, *supra*, note 3, at 246, and Draft Trustee Bill, s. 35(1).

limited in the case of an estate trustee. Our conclusion is that estate trustees should have the same power to borrow and mortgage real and personal property as ordinary trustees, and we so recommend.

In our view, the power of mortgaging[231] should be consistent with the the power of sale that we recommend in chapter 5 of this report.[232] We shall discuss the power of sale in considerable depth, and we do not wish here to present our analysis divorced from the context in which it was developed. At this stage, we prefer simply to state our recommendations respecting the power of mortgaging, with a summary explanation of the reasons, leaving the matter to be explained fully in our discussion of the power of sale.

We recommend that, subject to the power of the testator to provide otherwise, estate trustees should have a general statutory power to mortgage both the real and personal property of the estate. This power should be exercisable without notice to any person, including the Official Guardian and the Public Trustee;[233] moreover, it should be exercisable without any order of the court.

A testator may limit the power to mortgage estate assets by placing restrictions in his will. If restrictions were to affect the interest acquired by a mortgagee, all mortgagees would be bound to undertake inquiries to ascertain whether, and the extent to which, limitations were placed on the estate trustee. Requiring extensive inquiries of this nature would undermine the ability of estate trustees to exercise the broad mortgaging power we propose. In our view, restrictions should be binding on a mortgagee only if they come to his attention in two ways.

We recommend that a mortgagee in good faith and for value should be entitled to hold his interest freed and discharged from any debts or liabilities of the deceased owner, except those that are specifically charged thereon otherwise than by his will,[234] and freed and discharged from all claims of persons beneficially entitled thereto, and to hold his interest subject to the terms of the will only where the restrictions on the power of mortgaging are noted on the estate trustee certificate or where he has actual notice at the time of the mortgage that the estate trustee does not possess the power he purports to exercise, or that he is exercising the power in a manner that is

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231 Although we use the term "mortgage" in the text, all references in the textual discussion and recommendations should be read as including charges.

232 *Infra*, ch. 5, sec. 4(b).

233 Under s. 17(4) of the *Estates Administration Act*, *supra*, note 28, the concurrence and approval of the Public Trustee is required in place of that of the Official Guardian. While the approval of the Public Trustee is not necessary in the case of mortgages, we wish to make it explicit that it should not be required.

234 Examples of other liabilities are a construction lien on the property or a first mortgage.

contrary to that provided in the will. We also recommend that that a mortgagee should not be bound to see to the application of the money advanced.[235]

In the *Report on the Law of Trusts*, our discussion and recommendations respecting purchasers would also apply to mortgagees.[236] Our view was that, in general, a mortgagee from a trustee should be entitled to assume, on the basis of the appropriate instruments of appointment, discharge or vesting, that persons purporting to act as trustees are validly appointed, that the trust property is vested in them, that they possess the powers they purport to have, and that they are properly exercising those powers. We also took the view that this protection for mortgagees should apply where a new trustee is appointed, either as a substitute for a previous trustee or as an additional trustee.

In our view, protection of this kind should also apply to estate trustees. Consistent with the recommendations in the Trusts Report, we recommend that mortgagees from an estate trustee who rely upon the production of an estate trustee certificate or a deed of discharge that contains a vesting declaration, express or implied, whether or not they otherwise have notice of the will, should be able to assume without inquiry that the former estate trustees and the substitute or additional trustees possessed or possess and properly exercised or are properly exercising every power which they purported or purport to exercise over the property.[237]

In the *Report on the Law of Trusts*, we recommended that protection should not be extended to mortgagees who have actual notice that the trustees do not possess the power they purport to exercise, or that they are exercising a power improperly.[238] However, we were of the view that a mortgagee who has actual notice should be protected in a case where he obtains an interest from a mortgagee who did not have actual notice of this defect. Such a person, we recommended, should not take the trust property "subject to the terms of the trust".[239] We are of the view that the same policy should apply to mortgagees from estate trustees. We therefore recommend that a mortgagee who, at the time of the mortgage from the estate trustee, has actual notice that the estate trustee does not possess the power he purports to exercise, or that he is exercising a power in a manner that is

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[235] See, now, *Trustee Act*, *supra*, note 32, s. 22(2), which provides that, where a trustee raises money by mortgaging land for the purpose of renewing a lease, "no person advancing money upon a mortgage purporting to be made under this power is bound to see that the money is wanted, or that no more is raised than is wanted for the purpose or to see to the due application of the money".

[236] Section 1(n) of the Draft Trustee Bill defines "purchaser" to include "a mortgagee and any other person who for value has received an interest in or claim upon trust property".

[237] Draft Trustee Bill, s. 30(1).

[238] Trusts Report, *supra*, note 3, at 183.

[239] *Ibid.*

contrary to that provided in the will, should hold his interest subject to the terms of the will, unless he has obtained his interest from a prior mortgagee without actual notice that the estate trustee does not possess the power he purports to exercise, or that he is exercising a power in a manner that is contrary to that provided in the will.

The final issue relating to the recommended borrowing power is whether there should be an express restriction on the property that may be charged by the estate trustee. Under the existing law, a personal representative with power to carry on a business may borrow for that purpose only on the security of assets expressly or impliedly authorized to be used in the business.[240] Under the *Trustee Act*, a trustee may mortgage land for the purpose of renewing a lease, and the land given as security may be the land to be comprised in the renewed lease or any other land that is subject to the same trust.[241]

The breadth of the borrowing power that we have proposed raises a concern that beneficiaries may be unfairly disadvantaged by the mortgage of assets in which they may ultimately have an interest for the purpose of benefiting other assets in which other beneficiaries may have an interest. In our view, it is inequitable, for example, to mortgage an asset that forms part of the residue, thereby diminishing its value in the hands of the beneficiary who eventually receives it, in order to raise money to effect repairs on an asset held for another beneficiary or, perhaps, to infuse capital in order to continue a business.

However, while we accept this is a valid concern, we do not think that the answer is to confine the borrowing power of estate trustees by permitting mortgages to be charged only against the assets to be benefited by the funds advanced. To do so would be to draw a distinction between estate trustees and ordinary trustees where the potential problem can be otherwise effectively addressed.

In our view, an asset should not be mortgaged for the advantage of another asset without the written consent of the person entitled to the asset to be mortgaged. That person is not receiving any advantage from the benefit, and may indeed suffer a loss, should the mortgagee seek her remedies against the asset. Beneficiaries should not be put to that risk without their consent.Moreover, the ultimate liability for repayment of the loan should rest on the asset that has been benefited. Persons whose assets have been mortgaged or given as security should be able to have recourse to those assets where they suffer a loss as a result. Even with this measure, it should be appreciated that persons who consent to the mortgaging of the asset are assuming a risk, in that the asset benefited may have a value less than the amount of the loan.

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[240] *Supra*, this ch., sec. 3(e)(i)e.

[241] *Trustee Act*, *supra*, note 32, s. 22(2).

There are two basic situations in which it is necessary to provide for a mechanism by which a person whose asset has been mortgaged or given as security may recoup her loss. The first situation is where the mortgagee or secured lender realizes against that asset because there has been a failure to make a required payment or to repay the principal of the loan. This may occur while the estate is being administered or following distribution of the asset, subject to the mortgage, to the person entitled. In both cases, a remedy should be available. For example, a testator leaves the house to his surviving spouse, the family business to his daughter, and the residue to his grandchildren, and the house is mortgaged by the estate trustee to infuse needed funds into the daughter's business. Payments are not made to the mortgagee. If the mortgagee exercises her rights under the mortgage against the house by selling it, the surviving spouse should be entitled to proceed against the business. The scheme that we have in mind is analogous to the equitable principle known as "marshalling".[242]

The second situation we have in mind is where, following distribution of the property, the requisite payments are not made to the mortgagee. In our example, the spouse is threatened with losing her house and makes the payments herself. In such a case, she should be able to recover the amount of those payments by proceeding against the business.

Accordingly, we recommend that the estate trustee should be entitled to exercise his power to raise money by way of mortgage or other security for the purpose of benefiting an asset by mortgaging or giving as security an asset other than the asset to be benefited, but only with the written consent of the person entitled to the asset mortgaged or given as security. Where the mortgagee or secured lender realizes against the asset given as security for the loan, the person entitled to that asset should be entitled to recover against the asset benefited to the extent of his loss. Where the asset mortgaged or given as security is distributed to the person entitled to that asset, and that person makes payments to avoid realization by the mortgagee or secured lender, that person should be entitled to recover against the asset benefited to the extent of the payments made.

i. Execution of Administrative Powers

In the *Report on the Law of Trusts*, we recommended that the revised Act should provide that trustees may do all ancillary acts or things and execute all instruments necessary or desirable to enable them to carry out

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[242] Baker and Langan, *Snell's Principles of Equity* (28th ed., 1982) (hereinafter referred to as "Snell"), at 332, state that "[t]he general principle of marshalling is that if any beneficiary is disappointed of his benefit under the will through a creditor being paid out of the property intended for the beneficiary, then to the extent of the disappointment the beneficiary may recoup or compensate himself by going against any property which ought to have been used to pay the debts before resort was had to his property".

effectively the intent and purpose of the powers vested in them.[243] We are of the view that estate trustees should also be given this power expressly, and we so recommend.

As in the Trusts Report, we would emphasize that the only procedural or administrative acts that may be performed under this recommendation are those ancillary to the exercise of powers conferred by the will or legislation. If estate trustees wish to exercise a new administrative power that has not been expressly provided by statute or the will, the assistance of the court should be sought, in accordance with the proposals we make in the next section.

j. Enlargement of Administrative Powers

Under our proposals, testators will be free to exclude, modify, or add to the administrative powers that will be given to estate trustees by legislation. We recognize, however, that situations may arise where the interests of the estate would be served if estate trustees could exercise a power that has not been authorized by the will or conferred by the legislation. In such circumstances, we are of the view that there should be a mechanism available to permit an enlargement of the powers of the estate trustee.

In the trusts context, we met this problem by proposing that the court be given authority to grant the necessary power to the trustee. We recommended that where, in the administration of trust property, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction is in the opinion of the court expedient, but it cannot be effected because of the absence of a power for that purpose vested in the trustees by the trust instrument or by law, the court should be able to confer upon the trustees, either generally or in any particular instance, the necessary power on such terms and subject to such conditions as the court thinks fit. We recommended, in addition, that the court should be able to rescind, vary, or replace any such order, but that such a rescission, variation, or replacement should not affect any act or thing done in reliance upon the order before the person doing the act or thing became aware of the application to the court to rescind, vary, or replace the order.[244]

We recommend that the provisions respecting the enlargement of administrative powers that we have proposed in the *Report on the Law of Trusts* should apply to estate trustees.

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[243] Trusts Report, *supra*, note 3, at 249, and Draft Trustee Bill, s. 35(r).

[244] Trusts Report, *supra*, note 3, at 251-52, and Draft Trustee Bill, s. 63.

(ii) Power of Delegation

The rules developed by the courts of equity to govern the delegation of duties and powers by trustees apply also to personal representatives. The basic principles can be briefly stated. In the absence of a provision in the will or trust instrument, a personal representative or trustee may delegate "if the nature of the task to be performed necessitates delegation, or if it is common business practice to employ an agent in the circumstances".[245] Matters involving the exercise of discretion must be decided by the personal representative or trustee herself, although she may rely on advice.[246] Where an agent is employed, a trustee or personal representative must exercise the requisite degree of care in selecting the agent and in supervising the work being done. The applicable standard of care is that of ordinary business prudence. Where the proper care has been exercised in the choice and supervision of the agent, a trustee or personal representative will not be liable for loss caused by the defaults of the agent.

There has been statutory intervention in respect of the power to delegate. Section 20 of the *Trustee Act* provides that solicitors and bank managers may receive moneys as agents on behalf of trustees, and also empowers these agents to give discharges to the payors. It further provides that, if money or trust property is permitted to remain in the hands of or under the control of the solicitor or bank manager for a period of time longer than is reasonably necessary to enable her to pay or transfer the money or trust property to the trustee, the trustee is not exempted from any liability that she would have incurred had the Act not been passed. Section 33 of the *Trustee Act* provides, in part, that a trustee "is answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default". Both sections 20 and 33 apply to personal representatives.

We dealt at length with the delegation by trustees of duties and powers in the *Report on the Law of Trusts*.[247] We expressed the view that trustees must have the authority to delegate wherever it is reasonable and prudent by

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[245] Trusts Report, *supra*, note 3, at 44. See, also, Waters, *supra*, note 43, at 696-710.

[246] It is difficult to determine whether a power or duty is of a discretionary nature, which does not permit it to be delegated. Waters, *supra*, note 43, suggests that the following rule may be distilled from the authorities (at 707):

> [W]henever the power, discretion, or duty assigned to the trustee requires that a policy decision be made, the trustee must make it himself. A policy decision is one which, if dispositive, determines how much and at what time a beneficiary takes; if administrative, it directly affects the likelihood of the trust's object or purpose being achieved.

[247] Trusts Report, *supra*, note 3, at 42-57.

contemporary business standards to do so, but that the power of delegation should extend only to the delegation of administrative discretions, and should not permit the trustee to delegate dispositive discretions. We stated our conviction that a trustee should perform dispositive tasks personally, except where the testator or settlor provides otherwise.

We therefore recommended that section 20 of the Ontario *Trustee Act* should be repealed. In its place, we recommended the enactment of a provision authorizing trustees, where it is reasonable and prudent in the circumstances so to do, to employ one or more persons as agents within or outside Ontario to carry out any act required to be done in the administration of the trust, including the execution of documents, the payment, transfer, and receipt of money or other property, and the giving of discharges for receipts, but excluding the exercise of any express or statutory discretion as to the transfer or distribution of trust property to or among beneficiaries of the trust.[248]

With respect to the liability of trustees for the acts of agents, we recommended that, in employing an agent, trustees should personally select the agent and be satisfied of his suitability to perform the act for which he is to be employed, and that they should carry out such supervision of the agent throughout his employment as is prudent and reasonable.[249] In addition, we recommended that no term in a trust instrument, or in an oral declaration of trust, should be valid to the extent that it purports to absolve the trustees from this duty in the employment of agents.[250] Finally, in order to replace that part of section 33 of the present *Trustee Act* dealing with the extent of liability of trustees for defaults involving money and securities of the trust in the hands of others, we recommended that trustees should be chargeable for a loss caused by the default of an agent only if the loss is due, wholly or partly, to a breach of the recommended provisions concerning the power to employ agents and the duty of care in selecting and supervising agents, or is otherwise due to the trustees' negligence or wilful wrongdoing.[251]

We considered whether, having personally selected an advisor and having prudently supervised her, the trustee should be able to rely upon the advice given without inquiring further or incurring liability for any loss arising as a consequence of a failure to inquire. We recommended that trustees should not be liable for any loss to the trust if they rely reasonably and in good faith upon a written statement of an agent who is a duly

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[248] *Ibid.*, at 49, and Draft Trustee Bill, s. 5(1). The Commission also made recommendations respecting delegation by one trustee to another: *ibid.*, and Draft Trustee Bill, s. 6.

[249] *Ibid.*, at 51, and Draft Trustee Bill, s. 5(2).

[250] *Ibid.*, at 51, and Draft Trustee Bill, s. 7(c).

[251] *Ibid.*, at 52, and Draft Trustee Bill, s. 5(3).

accredited member of the legal, accounting, engineering, medical or any other profession.[252]

The final issue respecting delegation that we addressed concerned delegation by way of a power of attorney. Subject to certain qualifications,[253] we recommended that, by granting a power of attorney, a trustee should be able to delegate to any person, for any period not exceeding twelve months, the execution or exercise of all or any of the duties and powers vested in him as sole trustee or jointly with one or more other trustees.[254]

The reasoning underlying these proposals applies also to estate trustees, who similarly require the statutory authority to delegate the performance of certain tasks where it is reasonable to do so. However, as a practical matter, we expect that this power would be used less frequently and for lesser durations in the case of estates administration. Consequently, we recommend that the power of an estate trustee to delegate the exercise of his powers and the discharge of his duties should be identical to that of a trustee under the revised *Trustee Act*.

(iii) Joint Representation

The classic texts of estate administration use the term "joint representation" to refer to questions respecting the right of individual personal representatives to bind the estate and their co-personal representatives.[255] In the *Report on the Law of Trusts*, we addressed a similar issue in considering the so-called "rule of unanimity".[256]

The general rule of English law is that executors have joint and several authority; in other words, an act by one will have legal effect and bind the estate and his fellow executors. In the absence of a statutory provision stating otherwise, the act of one executor is regarded as the act of all of them. For example, a release of a debt by one of several executors is valid, and binds the other executors; similarly, in the absence of fraud, a settlement of an account by one executor will bind the others.[257]

The general rule, however, is subject to qualification. At common law, real estate did not devolve upon executors and, thus, acts done in relation to real estate were not comprehended by the rule. Nor were contracts made

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[252] *Ibid.*, at 54, and Draft Trustee Bill, s. 5(4).

[253] *Ibid.*, at 57, and Draft Trustee Bill, s. 8(2)-(7).

[254] *Ibid.*, at 56-57, and Draft Trustee Bill, s. 8(1).

[255] Williams, Mortimer and Sunnucks, *supra*, note 75, at 683.

[256] Trusts Report, *supra*, note 3, at 71-72.

[257] These examples are taken from Williams, Mortimer and Sunnucks, *supra*, note 75, at 683-84.

by an executor subject to the rule, for, as we shall discuss subsequently,[258] contracts made by an executor—even made exclusively for the benefit of the estate—are personal contracts, which do not ordinarily bind the others.

It is unclear whether the general rule respecting the joint and several authority of executors applies to administrators. While there would appear to be no practical justification for a distinction in this context between the two offices,[259] a 1975 English case, *Fountain Forestry Ltd. v. Edwards*,[260] found the authorities bearing on this issue inconclusive. However, after acknowledging the absence of "decisive authority", the court accepted the position that "an administrator has power, at the present day, to bind the intestate's estate by his own act without the concurrence of his co-administrator".[261]

While the general rule has long been accepted in England, doubt has been cast upon its applicability in Ontario by a 1946 decision of the Ontario Court of Appeal.[262] However, the reasoning of this judgement is seriously flawed.[263]

Legislation has appeared to have had only minor impact on these general principles. Section 48 of the *Trustee Act*, which deals with the debts or claims owed by and to the estate, confirms the several authority of one of several personal representatives to bind the others. Section 3 of the

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[258] *Infra*, this ch., sec. 4(a)(ii)a.

[259] But see *Hudson v. Hudson* (1737), 26 E.R. 292, where Lord Hardwicke suggested a theoretical justification based on the origins of the office of the administrator as a delegate of the ordinary, who was the Church official responsible for the administration of estates.

[260] [1975] Ch. 1.

[261] *Ibid.*, at 14.

[262] *Willcocks v. MacLennan*, [1946] O.W.N. 490 (C.A.). See, also, Widdifield, *supra*, note 102, at 255, which states that the rule respecting joint and several authority "seems to be accepted in Canada only to the extent that one executor may give a valid discharge of a debt or mortgage taken by the testator and owed to the estate."

[263] In *Willcocks v. MacLennan*, *supra*, note 262, Hogg J.A. stated as follows (at 491):

> If there are several executors of a will, one alone is not entitled to act on behalf of the others in connection with the sale of property forming part of the assets of an estate which is in their hands for administration: *Gibb v. McMahon* (1906), 9 O.L.R. 522, affirmed 37 S.C.R. 362. In the Court of Appeal, MacLennan J.A. said, at p. 525: 'Nothing is better settled than that where there are several trustees all must act.'

This decision is flawed in two respects. First, the only authority cited by the court, *Gibb v. McMahon*, was misinterpreted; the quoted sentence indicates that the same persons were appointed executors and trustees, and *Gibb v. McMahon* was decided on the basis that they were acting as trustees at the relevant time. Second, reference was not made to several Ontario cases that either applied, or assumed, the general rule of England to be correct. See, for example, *Cumming v. Landed Banking & Loan Co.* (1893), 22 S.C.R. 246; *Howitt v. Cope*, [1936] O.W.N. 523 (H.C.J.); and *Re Stair & Yolles* (1925), 57 O.L.R. 338, [1925] 3 D.L.R. 1201 (H.C. Div.). See, also Waters, *supra*, note 43, at 41-42.

Estates Administration Act provides a statutory exception to the general rule. This provision assimilates the position of real property to that of personal property, but concludes with a proviso "that it is not lawful for some or one only of several joint personal representatives without the authority of a judge to sell or transfer real property".[264] While sections 51 and 52 of the *Limitations Act* might appear to provide a further statutory exception,[265] it has been held that a written acknowledgment or part payment of a statute-barred debt by one of several personal representatives is sufficient to bind the estate.[266]

The present law in Ontario law in this area is uncertain in two important respects. First, there remains some doubt whether the general rule of English law that executors have joint and several authority is applicable. Second, even if this rule does apply in Ontario, it is not established clearly whether it extends to administrators.

Leaving aside the problem of uncertainty, we question the distinction that is drawn in this context between personal representatives and trustees. We can see no good reason why executors should have several authority, while trustees have joint authority. We therefore recommend that, where two or more estate trustees are appointed, they should have joint authority with respect to the estate of the deceased, and their duties and powers should be exercised only with the agreement of all.[267]

Requiring all the estate trustees to join in transactions may present problems where the estate trustee certificate is granted to only some of the

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[264] In the *Law of Trusts in Canada, supra*, note 43, at 42, Waters states that "while in English law since 1897 personal representatives have been unable to act singly when conveying freehold interests . . . there appears to be no such restriction in the Canadian common law provinces". This comment appears to disregard s. 3 of the *Estates Administration Act*, *supra*, note 28.

[265] *Supra*, note 158. These provisions state as follows:

> 51. Where there are two or more joint debtors or joint contractors, or joint obligors, or covenantors, or executors or administrators of any debtor or contractor, no such joint debtor, joint contractor, joint obligor, or covenantor, or executor or administrator loses the benefit of this Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed or by reason of any payment of any principal or interest made by any other or others of them.
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> 52. In actions commenced against two or more such joint debtors, joint contractors, executors or administrators, if it appears at the trial or otherwise that the plaintiff, though barred by this Act, as to one or more of such joint debtors, joint contractors, or executors or administrators is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise or payment, judgment shall be given for the plaintiff as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff.

[266] *Re Macdonald*, [1897] 2 Ch. 181, and *Re Chamandy* (1975), 8 O.R. (2d) 460, 58 D.L.R. (3d) 332 (Surr. Ct.).

[267] With respect to the vesting of property in estate trustees where 2 or more are appointed, see *infra*, ch. 5, sec. 4(a)(iv).

estate trustees named in the will. We have already explained that, where estate trustees are appointed by the will, like executors under the present law they will derive their authority from the will, and may perform acts relating to their office immediately upon the death of the deceased. Where the estate trustee certificate does not confirm the authority of all the estate trustees named in the will, it would be undesirable, in effect, to require third parties to find the estate trustees who have not received the estate trustee certificate and to secure their consent to a transaction.While this problem may arise rarely, given the present practice followed by Ontario courts in dealing with executors,[268] it is necessary to provide a mechanism that will allow third parties to enter into relations with estate trustees, without being concerned whether the particular transaction requires the consent of another estate trustee whose name does not appear on the estate trustee certificate. Throughout this report, we take the position that persons dealing with estate trustees should be able to rely on the estate trustee certificate as evidence of their authority, subject, in some cases, to the effect of actual notice to the contrary.[269]

In England, this problem has been addressed by legislation. A conveyance of real estate by personal representatives generally requires the agreement of all of them or an order of the court. Section 2(2) of the *Administration of Estates Act 1925* provides that, in the case of real estate, "where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate may be made by the proving executor or executors for the time being, without an order of the court, and shall be as effectual as if all the persons named as executors had concurred therein".

In our view, a similar provision should apply to estate trustees, but should not be confined to sales of real estate. Accordingly, we recommend that, where the estate trustee certificate has been granted to one or some of two or more estate trustees, whether or not power is reserved to the other or others to prove the will, any transaction may be effected and any power or authority exercised by the estate trustees named in the estate trustee certificate for the time being, and that act should be as effectual as if all persons entitled to be appointed estate trustees had concurred therein.

Finally, there are two ancillary matters that we shall address. First, where there are two or more estate trustees, there is a possibility that they will not be able to achieve unanimity with respect to an issue, thereby paralyzing the administration of the estate. We addressed the problem of deadlock in the Trusts Report, and recommended that, where it appears that the trustees are unable to achieve unanimity on a matter, one or more of them should be able to apply to the court for an order resolving the matter

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[268] Hull and Cullity, *supra*, note 1, at 199-200.

[269] See ch. 5, *infra*, sec. 4(b).

in any way that it considers proper.[270] We believe that a provision identical to that in the proposed *Trustee Act* should be enacted in the legislation governing estates, and we so recommend.[271] We should add that, in the event of a failure to act in concert, asking the court to resolve the matter would be but one alternative available to an estate trustee. As we shall see,[272] to address the situation where the failure is due to recalcitrance or dilatory behaviour on the part of an estate trustee, an application may be made for an order directing an estate trustee to do a specific act. In a more serious case, an estate trustee may be liable to removal by the court or by his fellow estate trustees.[273]

The last issue that we wish to consider relates to the situation where a will provides expressly that the estate trustees are to act by a majority. While there is no authority in England or Canada, it would appear that ordinarily it is the duty of estate trustees who are in the minority with respect to an issue to comply with the decisions of the majority, in default of which they may be held liable. Where, however, the minority knows, or ought to know, that the majority is acting in violation of its duty, it is not justified in complying with the majority position. In such a case, the minority may seek the assistance of the court or apply to have the other estate trustees removed.

Where there is a difference of opinion between the estate trustees, a problem may arise where the particular legal instrument by which the majority of estate trustees purports to act requires concurrence by all estate trustees, including the dissenting minority. For example, although the will may empower the majority to act on behalf of the estate, a particular legal instrument might have to be signed by all the estate trustees to give it legal

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[270] Trusts Report, *supra*, note 3, at 72, and Draft Trustee Bill, s. 13(2).

In the Trusts Report, the Commission explained why it did not think that the problem of deadlock was met by s. 60 of the *Trustee Act*, *supra*, note 32, which allows personal representatives to apply to the court for its opinion, advice or direction on any question concerning the management or administration of the estate assets. The Commission stated (at 71):

> [Section 60] is of limited utility. The reason is that the exercise of a trust power involves essentially the exercise of a discretion vested by the trust instrument or the legislation in the trustees, and the courts traditionally have refused to interfere with the exercise of discretion by trustees.Accordingly, in order for the court to exercise its power under section 60, it must be clear that trustees are in disagreement about whether or not to exercise a certain power. If they are agreed that a power should be exercised . . . but disagree about the circumstances in which they should exercise the power . . . it appears that Ontario courts will not resolve this disagreement by issuing a direction under section 60 of the *Trustee Act*.

[271] But see Scane, "The 'Unanimity Rule' and Court Interference with Trustees' Discretion" (1986-88), 8 E.T.Q. 204.

[272] *Infra*, ch. 6, sec. 2(b).

[273] *Infra*, this ch., sec. 6(c)(ii).

effect.[274] While, under our recommendations, the majority would be entitled to apply to the court for an order requiring the dissenting estate trustees to perform the requisite act to effectuate the decision of the majority, we believe that recourse to the courts in such a case should be rendered unnecessary. In our view, it would be preferable to confer authority on the majority to give legal effect to the acts on which it has agreed. Accordingly, we recommend that, where a will authorizes a majority of estate trustees to act, the majority should also be empowered to do all acts and things and execute all instruments necessary to carry out the act.

(h) The Professional Estate Trustee

In the *Report on the Law of Trusts*, we discussed the so-called "professional trustee" and the standard of care to which she should be subject.[275] Like the management of trusts, estate administration is often conducted by persons who hold themselves out to the public as having particular expertise to carry out this task and for which they receive compensation.

We believe that the conclusions stated in the Trusts Report are entirely appropriate in this context. Suffice it to reiterate our view that a higher standard of care should be asked of persons who have special skills, or who attract business because they hold themselves out as having such skills. In furtherance of this principle, we recommended that, in addition to the general duty of care applicable to all trustees, trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, should employ that particular level of knowledge or skill in the administration of the trust.[276] We recommend that professional estate trustees should also be subject to this higher standard.

4. LIABILITY

In this part of the chapter, we shall consider the liability of estate trustees. We shall examine the nature and extent of the liability of estate trustees; in particular, we shall consider whether, and the circumstances under which, they should bear personal responsibility. We shall also discuss whether, in the circumstances where estate trustees would otherwise be personally liable, the court should be empowered to relieve them from that liability. Finally, we shall consider whether exoneration from liability provided in a will should be given legal effect.

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[274] For example, even where the will authorizes a sale of realty to be decided by a majority, the signatures of all the estate trustees in whom the property was vested would be required on the deed for it to pass good title.

[275] Trusts Report, *supra*, note 3, at 29-35.

[276] *Ibid.*, at 35, and Draft Trustee Bill, s. 4(2).

(a) Nature and Extent of the Liability of the Estate Trustee

The nature and extent of the personal representative's liability arises as a question under the present law because an estate is not a legal entity, like a corporation, that itself can acquire rights or incur liabilities or that can sue or be sued. Hence, the only legal person against whom an action can be brought, whether it is for an act or omission of the deceased occurring prior to death, or for a contract made by the personal representative in the course of the administration of the estate, is the personal representative. While the special character of the estate requires that suits be brought against personal representatives as defendants, there is a question whether they should bear liability of a personal nature, for which their own assets may ultimately answer, or liability of a representative nature, rendering only the assets of the estate liable.

Describing the nature of the liability of a personal representative under the existing law is a somewhat complicated exercise. The complexity arises from the necessity of considering the issue in various contexts. First, there is an issue as to the nature of the liability assumed by the personal representative for acts or omissions of the deceased by virtue of her being the *alter ego* of the deceased. Second, there is the question of the liability of the personal representative for her own conduct in the administration of the estate. The latter question must be considered separately in relation to two groups: (1) the beneficiaries and creditors of the deceased, and claimants against the estate in respect of acts of the deceased, to whom the personal representative owes certain duties; and (2) third parties, who are strangers to the estate by virtue of their not being members of the first group, but who are affected by the acts of the personal representative in administering the estate, either because they have entered into contractual relations with her or have been otherwise affected, perhaps by being the victim of her tortious conduct.

While, therefore, the nature of the liability must be considered in somewhat different contexts, the basic issue that shall concern us is constant: should the personal representative bear personal liability for the acts in question, or should she be liable only in a representative capacity, so that only the assets of the estate, and not her own, be required to answer for those acts?

We shall turn first to discuss the present law governing the liability of a personal representative for acts of the deceased. We shall then consider the liability of the personal representative for her own acts in the administration of the estate. In the latter connection, we shall consider the standards governing her conduct in those circumstances where she does bear personal liability for her acts. While, in a sense, we have already decided this latter issue through our fundamental recommendation that the estate trustee should be subject to the same duties as those imposed on an ordinary trustee by the proposed *Trustee Act,* which, of course, would include the proposed statutory duty of care, it is important to review the existing law to appreciate fully the significance of this recommendation.

(i) Liability for Acts of the Deceased

The general rule has long been that a personal representative is liable in a representative capacity in relation to causes of action that survive the death of the deceased.[277] While she may be sued, insofar as the liabilities of the deceased devolve upon her as representative of the deceased, the assets of the estate will be responsible for satisfying the judgment, and her own assets are immune.[278]

The general principle is not reflected exactly in the Ontario rules of court. Rule 9.01(1) provides that "[a] proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust". However, it does not explicitly indicate the nature of the potential liability.[279] By contrast, under the former Ontario Rules of Practice, the Appendix of Forms included a "Judgment Against an Executor or Administrator", which stated that execution was to be levied against the property of the deceased at the time of his death or which thereafter come into the hands of his personal representative to be administered.[280]

The general rule that a personal representative is liable only in a representative capacity is subject to an important qualification. In *Commander Leasing Corp. Ltd. v. Aiyede*,[281] the Ontario Court of Appeal described the circumstances in which personal liability may be visited on an

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277 Certain statutes deal with this issue specifically. For example, personal representatives holding shares as personal representatives are not personally liable: see *Business Corporations Act, 1982* , S.O. 1982, c. 4, s. 34(8); *Co-operative Corporations Act*, R.S.O. 1980, c. 91, s. 72(5); *Corporations Act*, R.S.O. 1980, c. 95, s. 37(5); and *Loan and Trust Corporations Act, 1987*, *supra*, note 39, s. 50(7).

278 *Hogan v. Morrissy* (1864), 14 U.C.C.P. 441.

279 Rule 9.02(1) provides that, where a person wishes to sue an estate of a deceased person, but an executor or administrator has not been appointed, the court may appoint a litigation administrator to represent the estate for the purposes of the proceeding.

It should be noted that r. 9.02(2) provides that "[a]n order in a proceeding to which a litigation administrator is a party binds or benefits the estate of the deceased person, but has no effect on the litigation administrator in his or her personal capacity, unless a judge orders otherwise". Rule 1.03.19, as am. by O. Reg. 323/86, states that " 'order' includes a judgment".

280 Similarly, in England, the form of judgment required by the Rules of the Supreme Court states that the defendant as executor or administrator is to pay the prescribed amount and costs to be taxed. It provides further that the "said sum and costs [are] to be levied of the real and personal estate within the meaning of the Administration of Estates Act 1925 of the deceased at the time of his death come to the hands of the defendant as such executor [*or* administrator] to be administered, if he has or shall hereafter have so much thereof in his hands to be administered": see R.S.C. 1965, Appendix A, Form 49 (Judgment for liquidated sum against personal representative), and Ord. 42, r. 1.

281 (1983), 44 O.R. (2d) 356, 4 D.L.R. (4th) 107 (subsequent reference is to 44 O.R. (2d)). See, generally, Williams, Mortimer and Sunnucks, *supra*, note 75, at 803-04.

executor or administrator, even though the underlying cause of action related to an act of the deceased:[282]

> It has long been established that if an executor or administrator has no assets to satisfy the debt upon which an action is brought, in the absence of a plea of no assets or *plene administravit*, he will be taken to have conclusively admitted that he has assets to satisfy the judgment and will be personally liable for the debt and costs if they cannot be levied on the assets of the deceased. If the executor has some, but insufficient, assets to satisfy the judgment and costs, a plea of *plene administravit praeter* will render him liable only to the amount of assets proved to be in his hands as executor.

(ii) Liability of the Estate Trustee for Her Own Acts

As we have explained, a personal representative bears personal liability for the performance of her duties and the exercise of her powers in the administration of the estate. This liability may arise in relation to two groups who are affected by her administration. The first group consists of the beneficiaries, creditors and persons having claims against the estate. To the persons within this group, a personal representative owes a duty to manage the estate carefully so as not to prejudice or defeat their interests. Under the present law, the principles applicable to the nature of this duty are not entirely clear.

The second group of persons to whom an executor or administrator may be personally liable consists of strangers to the estate, in the sense that they have had no relationship to the deceased during his lifetime, but who are affected by the conduct of the personal representative in administering the estate. This would include persons with whom the personal representative makes contracts and persons injured by his tortious or other conduct.

We shall begin by discussing the nature of the personal representative's liability in relation to strangers to the estate and then proceed to consider liability to beneficiaries, creditors and other persons with claims against the estate.

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[282] *Supra*, note 281, at 358. It would appear that the procedure in Ontario for obtaining a judgment against a personal representative personally differs from that in England. In England, before a judgment creditor can proceed against an executor or administrator personally, two judgments must be obtained: he must first obtain judgment against the personal representative in a representative capacity and then must bring a second action alleging a *devastavit*, usually following the sheriff's return of a *nulla bona*: see Williams, Mortimer and Sunnucks, *supra*, note 75, at 818-19. In Ontario, it is not necessary to proceed in two stages to obtain judgment against an executor or administrator personally. A judgment creditor can pursue a claim against the estate and allege *devastavit* in a single action and can have judgment against the personal representative personally if there are insufficient assets to meet the judgment and there has been no plea to that effect: see *Commander Leasing Corp. Ltd. v. Aiyede*, *supra*, note 281.

a. In Relation to Strangers to the Estate

In reviewing the law respecting the liability of a personal representative incurred in the administration of the estate, it is important to recall the basic principle that "the estate" is not recognized by the law as a distinct juridical person. An estate cannot "act" in a legal sense, incur liability or be treated as a principal in an agency relationship and, consequently, it cannot be sued. Thus, after the death of the deceased, personal representatives do not, in any legal sense, act on behalf of the estate, either as an agent or in any other representative capacity; personal representatives can only act personally, notwithstanding that their conduct is intended to benefit the estate and, indeed, should not enure to their own personal advantage.

The following policy reason has been given for this rule:[283]

> It is familiar learning that a trustee is personally liable for those debts which he incurs in the course of the administration of the trust estate. So also is he personally liable for the torts committed by him or his employees in carrying out the trust, although they were committed in the performance of duties imposed by the trust or in the execution of powers conferred upon him by virtue of his office as trustee. *The same doctrine of personal liability is applied to executors and guardians.* Although these liabilities are incurred in the furtherance of an enterprise in which the trustee has no economic interest and which is carried on for the benefit of the *cestui que trust*, whom courts of equity consistently recognize as entitled to the entire economic interest in the trust enterprise, nevertheless, the doctrine of personal legal liability of the trustee is consistent with the policy of the law which entitles one to rights against him with whom he contracts or against him whose acts, either personal or those for which he is responsible on the doctrine of *respondeat superior*, have caused an actionable wrong or injury.
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> Nor does the practical operation of this rule of personal liability operate harshly with respect to the trustee or conflict with the economic interests of the parties. If the trustee is compelled to satisfy the personal obligation which he has incurred, he may appropriate from the assets of the trust such amount as is required to indemnify him, unless his act in incurring the liability is of such a character as to amount to a violation of his duties as trustee, in which case, of course, it is proper both ethically and economically, as well as legally, that the burden of loss should be cast upon him whose act occasioned it. If there are no assets of the trust estate with which to indemnify the trustee, the practical working out of the rule so that, in such a case, the trustee incurs the liability at his peril is not unwholesome. He with whom the trustee contracted or who has suffered from the trustee's tort should be compensated in damages. This can be effected, if there are no trust assets, only through the personal liability of the trustee, who may always avoid incurring such liability if the trust estate is without funds to indemnify him.

There has been some confusion concerning the nature of contractual liability. By contrast, the position with respect to tortious conduct is clear:

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[283] Stone, "A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee" (1922), 22 Colum. L. Rev. 527 (emphasis added).

"[a] personal representative is, of course, personally responsible for all torts committed by him, but where the injury has been occasioned by him or by his agents in the reasonable management of the trust estate he is entitled to be indemnified out of the assets".[284]

While the preponderance of authority states that the personal representative is liable personally for contracts made after the death of the deceased,[285] it would appear that the position is not entirely settled.[286] However, it is clear that, where a personal representative incurs debts in the course of carrying on a business of the deceased, she is personally liable for them.[287]

More uncertain is the issue whether a personal representative is able to contract in a representative capacity, exonerating himself from personal liability, by including an express stipulation to that effect in an agreement. The cases bearing upon this matter, which concern trustees, rather than personal representatives, are conflicting. In *Muir v. City of Glasgow Bank*,[288] a decision of the House of Lords, there is an *obiter dictum* stating that executors can enter into a contract excluding their personal liability and providing that the creditor will be paid out of the estate assets. In *Re Robinson's Settlement*,[289] this *dictum* was approved by one of the judgments. In *Watling v. Lewis*,[290] the court held ineffective a covenant in a deed that purported to deny personal liability on the part of trustees.

Before turning to consider the liability of personal representatives to beneficiaries, creditors and other claimants, we wish to emphasize that the practical reality of estate administration does not comport with the outline of the law that we have presented. In theory, a personal representative discharges the obligations assumed by him on behalf of the estate personally, and he then seeks reimbursement from the estate. In practice, personal

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[284] *Halsburys' Laws of England*, Vol. 17 (4th ed., 1976), para. 1540, at 785. See, also, Williams, Mortimer and Sunnucks, *supra*, note 75, at 695.

[285] *Halsburys' Laws of England*, Vol. 17 (4th ed., 1976), para. 1537, at 784.

[286] See *Padwick v. Scott* (1876), 2 Ch. D. 736, at 743, which suggests that a question remains whether a personal representative should be sued in a representative capacity or personally in respect of a contract made in the course of administration. See, also, Williams, Mortimer and Sunnucks, *supra*, note 75, at 695-96, which explains certain apparent "exceptions" to the general principle that a personal representative is to bear personal liability.

[287] *Re Robertson*, [1948] O.R. 764, [1948] 4 D.L.R. 606 (H.C.J.), and *G. Soloway & Sons Ltd. v. Pearlman*, [1964] 1 O.R. 1 (H.C.J.), aff'd [1964] 1 O.R. 448, 42 D.L.R. (2d) 690(C.A.); Widdifield, *supra*, note 102, at 26; and *Halsburys' Laws of England*, Vol. 17 (4th ed., 1976), para. 1214, at 624. The personal representative is entitled to indemnification out of the assets of estate where she has properly incurred liabilities. For a discussion of indemnification, see *infra*, this ch., sec. 5(g).

[288] (1879), 4 App. Cas. 337, [1874-80] All E.R. Rep. 1017 (*per* Lord Cairns).

[289] [1912] 1 Ch. 717 (C.A.), 81 L.J. Ch. 393 (*per* Buckley L.J.).

[290] [1911] 1 Ch. 414, 80 L.J. Ch. 242.

representatives pay for services directly out of an estate account; only in rare cases will a personal representative expend his own money and subsequently seek indemnification.[291]

b. In Relation to Beneficiaries, Creditors, and Claimants Against the Estate

The general principles relating to the personal liability of personal representatives to beneficiaries, creditors, and claimants are not entirely clear. In part, the confusion is caused by the fact that a breach of duty by a personal representative is characterized sometimes as *devastavit*, while other times it is regarded as a breach of trust. It is difficult, moreover, to distinguish the two concepts.

Williams, Mortimer, and Sunnucks state that a *devastavit* is conduct that amounts to "such a violation or neglect of duty by an executor or administrator, as will make him personally liable or accountable".[292] The term itself refers to a wasting of assets. It has been given the following definition:[293]

> [*Devastavit*] is defined to be a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators must answer out of their own pockets, as far as they had, or might have had, assets of the deceased.

Williams, Mortimer and Sunnucks suggest that, insofar as a personal representative is considered to be a trustee for certain purposes, breach of the usual trusts that are associated with that office will lead to personal liability.[294] Accordingly, the distinction between *devastavit* and breach of trust is explained as follows:[295]

> The same act may amount both to breach of trust and *devastavit*, but the strict distinction between the two, so far as material, is that *devastavit* is a breach of the duty of administration and may therefore arise where there is no express or implied trust at all, whereas simple breach of trust will normally occur after administration is complete when the assets are being held upon the trusts of the will or the statute.

A variety of acts may constitute *devastavit*. Deliberate misuse of the estate assets, for example, by converting them to his own use or applying

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[291] With respect to trustees, see Waters, *supra*, note 43, at 944.

[292] Williams, Mortimer and Sunnucks, *supra*, note 75, at 710.

[293] *Ibid.*, quoting *Re Stevens*, [1898] 1 Ch. 162 (C.A.), at 177. Widdifield, *supra*, note 102, at 270, states that the "common law referred to all neglect of duty by an executor as a '*devastavit*' and he was personally responsible therefore".

[294] *Ibid.*

[295] *Ibid.*, at 711.

them to pay his own debts to a third party, would amount to *devastavit*. Personal representatives may be found liable in *devastavit* for acts of negligence or wrongful administration that defeat the rights of beneficiaries and creditors.[296] Paying debts out of their proper order or paying a legacy where the assets are insufficient to pay creditors may lead to liability unless a personal representative has first advertised for creditors.[297] Applying the assets to pay a claim that need not have been satisfied may be *devastavit*, even though the personal representative, in making the payment, has acted on the best advice that she could obtain.[298]

One confusing area is the responsibility of personal representatives for loss of the deceased's assets. It has been suggested that executors and administrators are not liable for loss of assets, except in the case of "wilfil default".[299] The leading commentators accept that "wilful default" means that, in doing the alleged act, or failing to do what he should have done, the personal representative is conscious that "he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not".[300] If this is the applicable standard, it would mean that, while other acts of negligence may constitute *devastavit*, in the case of a loss of estate assets, mere negligence is insufficient to incur liability.

Personal representatives are liable not only for the assets that they have received, but also for assets they might have received, but for their default; the standard is said to be "wilful default".[301] However, it has also been suggested that liability for failing to get in assets depends simply on proving loss to the estate resulting from a breach of duty,[302] and, except as modified by statute, that breach may consist of a negligent failure to collect the assets.[303]

Professor Waters describes the basis of liability for breach of trust as follows:[304]

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296 *Ibid.*, at 712 and 717.

297 See *infra*, ch. 4, sec. 4(c)(i).

298 Williams, Mortimer and Sunnucks, *supra*, note 75, at 711-12.

299 *Ibid.*, at 712, citing *Job v. Job* (1877), 6 Ch. D. 562, at 564.

300 *Re Vickery*, [1931] 1 Ch. 572, at 583, [1931] All E.R. Rep. 562, at 567. Both Snell, *supra*, note 242, at 341, *n.* 51, and Williams, Mortimer and Sunnucks, *supra*, note 75, rely on this defintion even though *Re Vickery* interpreted "wilful default" within the context of an English provision equivalent to s. 33 of the Ontario *Trustee Act*, *supra*, note 32.

301 Snell, *supra*, note 242, at 341.

302 Clark, *Parry and Clark*[:] *The Law of Succession* (9th ed., 1988), at 389, and Stannard, "Wilful Default" (1978), 43 Conv. 345, at 348.

303 For a discussion of the impact of s. 48(2) of the *Trustee Act*, *supra*, note 32, see *supra*, this ch., sec. 3(c).

304 Waters, *supra*, note 43, at 987-88. The strictness of these principles is mitigated by the statutory provisions for relieving trustees from liability: see *infra*, this ch., sec. 4 (b).

> A breach of trust occurs whenever a trustee fails to carry out his obligations under the terms of the trust, the rules of equity, or statute. The failure may may take the form of doing something contrary to those obligations, or of neglecting to do something which he ought to have done.
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> . . .
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> A breach of trust occurs when the trustee's duty to act precisely within the terms of his obligations is not fulfilled. If he fails in this, it is of no significance that he had no intention of departing from his duty. Trustees have been found in various conditions of blame-worthiness – fraudulent, wilfully neglectful, slovenly in their conduct of trust affairs, and incompetent – but none of these elements needs to be proved in order to establish a breach of trust. If the letter of the trustee's obligation has not been adhered to for whatever reason, he is liable to his beneficiaries for any loss which has occurred as a result.

Before stating our conclusions and our recommendations for reform, we should consider the concept of executor *de son tort*, which strictly speaking, falls outside the purview of this section, insofar as it does not relate to the liability of a personal representative. However, since it is a device that is used to fix liability in connection with an estate, it may properly be discussed under this rubric.

An executor *de son tort* is a person who, without authority, intermeddles with the estate of the deceased and, as a consequence, is treated for some purposes as an executor.[305] A person will also be treated as an executor *de son tort* if he makes a claim to act as executor, for example, by bringing or defending an action in that capacity.[306]

As we have indicated, essentially the executor *de son tort* is a judicial mechanism employed to fix liability on the intermeddler. Liability may arise in relation to creditors and legatees and to the lawful personal representatives.

An executor *de son tort* has no duty to get in the assets of the deceased and a general order for administration cannot be made against him.[307] He is, however, liable in equity to account for assets actually received,[308] and he is liable to pay debts and legacies to the extent of the assets actually received by him.

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[305] Williams, Mortimer and Sunnucks, *supra*, note 75, at 93, state that "[t]he same term is used whether the deceased died testate or intestate, for the law knows no such appellation as 'administrator *de son tort*'."For a discussion of the acts giving rise to liability on this basis, see Williams, Mortimer and Sunnucks, supra, note 75, at 94-95.

[306] *Ibid.*, at 95. See, also, *Charron v. Montreal Trust Co.*, [1958] O.R. 597, 15 D.L.R. (2d) 240 (C.A.).

[307] Williams, Mortimer and Sunnucks, *supra*, note 75, at 99.

[308] *Coote v. Whittington* (1873), L.R. 16 Eq. 534, 42 L.J. Ch. 846.

The liability of an executor *de son tort* to the lawful personal representative rests on a different basis. Williams, Mortimer, and Sunnucks explain that "liability in this case . . . depends not on his having so acted as to make himself chargeable as executor, but on the general law regarding interference with the property of another".[309] Thus, liability may be founded in trespass or conversion.

(iii) Conclusions and Recommendations

From the preceding discussion, it should be apparent that the existing law relating to the nature and extent of the liability of the personal representative is complex and, in certain respects, uncertain. We believe that the law should not continue to apply to the new office of estate trustee without substantial modification to bring clarity to this area.

In setting out our recommendations for reform, we shall deal with the topics in the order in which they were discussed in the previous sections. We begin with liability for acts of the deceased.

With the exception of a single matter, we believe that the present law respecting the responsibility for acts of the deceased is satisfactory. As we have explained, the general rule is that personal representatives are liable in a representative capacity. The only criticism we have of the existing law concerns the exception to the general rule. The requirement of pleading *plene administravit* or *plene administravit praeter* to avoid personal liability if there are no or insufficient assets is a residuum of the medieval rules of pleading.[310] Moreover, it places plaintiffs in a better position than they would have been in had the deceased lived; if the deceased were living, a plaintiff would have been put to the usual inquiries to ascertain whether he had sufficient assets to make a suit worthwhile. Had the plaintiff failed to discover that the defendant had no assets, he would have received nothing.

A further criticism of this requirement of pleading is that the sanction imposed for a failure to make the proper plea—personal liability for the debt—is disproportionate to the injury suffered by the plaintiff, which is the expense of fruitless litigation. While we disagree with the gravity of the sanction, we are of the view that estate trustees should be encouraged to warn plaintiffs where there are no or insufficient assets in the estate, so that plaintiffs can choose to avoid the unnecessary expense and inconvenience of proceeding to judgment. The appropriate incentive is a potential award of costs against the estate trustees.

Accordingly, we recommend that the requirement of pleading *plene administravit* or *plene administravit praeter* in actions brought against estate

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[309] Williams, Mortimer and Sunnucks, *supra*, note 75, at 100.

[310] See text at note 6, *supra*.

trustees, and the imposition of personal liability for a failure to make either plea, should be abolished. However, we recommend that the estate trustee should be personally liable for costs unless she advises a plaintiff in writing that there are no assets or insufficient assets in the estate to satisfy the amount of the debt upon which the action is brought.

In our discussion of the present law governing the liability of personal representatives for their own acts, we explained that, in relation to strangers to the estate, there was a degree of uncertainty in the law. While the law is clear that personal representatives are personally liable for their own torts, the principles governing contractual liability are unclear. Particularly uncertain is whether personal representatives may contract in a representative capacity, so that their own assets are immunized from any future claim arising from the contract.

In our view, estate trustees should be able to contract on the basis that their liability is limited to the assets of the estate. At present, a trustee may have a term introduced in the contract that he undertakes no personal liability, in which case the third party may have recourse only against the trust property. If such a provision is incorporated in the contract, in the event of a breach of contract by the trustee, the third party assumes the risk that the trust property will be adequate to compensate her for her loss.[311] In our view, the same principles should apply to estate trustees. Accordingly, we recommend that estate trustees should be allowed to contract on the basis that they incur no personal liability and that the person contracting with the estate trustee should be able to have recourse only to the assets of the estate.

With respect to the liability of the estate trustee to beneficiaries, creditors, and claimants of the estate, we can see that the law has been complicated by the parallel development of principles by the common law courts and the Court of Chancery, the result of which is the confusing distinction between liability in *devastavit* and liability for breach of trust. Both concepts appear to cover identical ground, imposing liability for the same conduct. Further uncertainty about the requisite standard has been imported by those cases that assert that liability is to be based on "wilful default".

We believe that the confusion in the existing law would best be cured by adoption of the principles of liability that we have proposed for ordinary trustees in the Report on the Law of Trusts.

We therefore recommend that the nature and extent of the liability of an estate trustee for his administration of the estate should be the same as for an ordinary trustee. Where liability is premised upon a lack of care, the standard of care set out in section 4 of the draft Trustee Act should apply to estate trustees. The distinctions between *devastavit* and breach of trust should be abolished; the liability of the estate trustee should be determined

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[311] Trusts Report, *supra*, note 3, at 371.

by the latter concept. In some cases, this will involve imposition of liability in the absence of fault.

Finally, we believe that the concept of executor *de son tort* has no place in a modern law of estates administration. In our view, the liability of a person who intermeddles with estate property should be determined by the general law governing interference with property, and the responsibility for seeking relief should rest on the estate trustee. This is consistent with our general view that the central locus of responsibility should be fixed on the estate trustee.

We reject the approach taken in those jurisdictions that have sought to modernize this concept by some manner of reform. In particular, we disagree with section 28 of the English *Administration of Estates Act 1925*,[312] which modifies the concept, most importantly by giving an executor *de son tort* the right to retain debts owed to him by the deceased.[313] We consider that this is inappropriate.[314]

We prefer to abolish the concept of executor *de son tort*. Although abolition of this concept would eliminate the present right of creditors and legatees to sue the intermeddler directly, except insofar as such a right exists independently, it would provide for certainty and eradicate the confusion that is created by attempting to treat an intermeddler as an estate trustee. We therefore recommend that the concept of executor *de son tort* should be abolished, and that a person who intermeddles with the estate of a deceased person should be liable under the general law for any loss caused to the estate by the intermeddling.

(b) Statutory Provisions for Relief of Estate Trustees

Under the existing Ontario law, a personal representative may be relieved from personal liability that would otherwise arise from his conduct.[315] The source of the relief may be found in the *Trustee Act* and, in a

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[312] *Supra*, note 16.

[313] At common law, an executor *de son tort* did not have any right to retain.

[314] We agree entirely with the following criticism in Clark, *supra*, note 302, at 147-48:

> Any debt for valuable consideration and without fraud due to the executor *de son tort* from the deceased at death [may be deducted from the assets for which he is liable]. Thus an executor *de son tort* may apparently 'retain' for his own debt as against another creditor, even though the other creditor is of a higher degree and even though the executor *de son tort* has reason to believe that the deceased's estate is insolvent. In this respect, unfortunately, an executor *de son tort* is treated more favourably than a personal representative.

[315] In addition, there are statutory provisions—such as s. 48(1) and (2) of the *Trustee Act*, *supra*, note 32, that permit acts that otherwise would be breach of duty. We have already examined these provisions in connection with our discussion of the duty to get in the estate and the duty to pay debts: see *supra*, this ch., secs. 3(c) and (d).

limited context, in the inherent jurisdiction of the court. The provisions of the *Trustee Act* address relief in connection with breach of trust, the payment of debts, and certain contingent liabilities. We shall consider each of these matters in turn.

Turning first to breach of trust, two provisions of the *Trustee Act* are relevant. The more important is the general relieving provision, section 35, which provides as follows:

> 35. If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which he committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same.

Section 34 of the *Trustee Act* also deals with relief from breach of trust, but in narrower circumstances. It provides that, where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may make an order impounding all or any part of his interest by way of indemnity to the trustees or persons claiming through them.[316]

In the *Report on the Law of Trusts*, we considered both section 34 and section 35. With respect to section 34, we took the view that the power contained therein should be retained; accordingly, we recommended that, where trustees commit a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court should be able to make an order impounding all or any part of the interest of the beneficiary in the trust estate by way of contribution or indemnity to the trustees or persons claiming through them.[317]

With respect to section 35, it should be emphasized that it requires that a trustee act honestly, reasonably, and be in the position that he ought fairly to be excused. The requirement of honesty and reasonable conduct suggests that the section is concerned essentially with technical breaches. As we have indicated, a trustee or personal representative may be liable for a technical breach of trust, notwithstanding the absence of fault on his part; acting in any respect and to the slightest degree contrary to the terms of the trust or will would constitute such a breach.

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[316] This statutory provision was intended to supplement and to enlarge the power of the court under its inherent jurisdiction to order indemnification of a trustee from the beneficial interest of a beneficiary in certain circumstances: see, generally, Waters, *supra*, note 43, at 1012-14. It would seem that the inherent jurisdiction also applies to personal representatives.

[317] Trusts Report, *supra*, note 3, at 384, and Draft Trustee Bill, s. 55.

The power conferred by section 35 has been exercised to excuse trustees in a variety of circumstances other than a technical breach. Moreover, since the provision does not require a trustee to admit to a breach of trust, the courts have often excused a trustee without actually deciding that there was a breach, which can make it difficult to determine the difference between behaviour that constitutes breach and behaviour that justifies relief. In our view, this raised the question whether the revised *Trustee Act* should state simply that "a trustee should be excused for breach of trust only in those circumstances where he is not personally to blame, because of either his lack of good faith or his negligence".[318] We concluded that such a change could not be proposed without first being able to identify all the circumstances that might constitute technical breach for which a trustee should be excused. Having regard to the present state of the law, this was thought to be impossible. Furthermore, we were of the view that it was valuable to allow courts to assess the merits of the conduct of each trustee whose action has been challenged on the basis of an alleged breach of trust. We observed that "there may also be circumstances, possibly not constituting technical breach, in which some of the older precedents would impose liability upon trustees, but where, because of the absence or minimal degree of fault, a modern court might prefer to take a less strict approach towards liability".[319]

It was our view that the judicial excusing power should be retained so that a court can ensure that a trustee is liable only to the extent that blame attaches to his conduct.[320] We therefore recommended that section 35 of the present *Trustee Act*, permitting the court to excuse trustees for breach of trust, should be carried over to the revised *Trustee Act*. More particularly, we recommended that the revised Act should contain a provision to the effect that, if in any proceedings affecting a trustee or trust property it appears to the court that a trustee, or any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for a breach of trust, whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust, and for not obtaining the directions of the court in the matter in which he committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the breach.[321]

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[318] *Ibid.*, at 38.

[319] *Ibid.*

[320] With respect to the task that is given to the court, the Trusts Report, *ibid.*, at 38, commented as follows:

> It requires more of the courts than a well-meaning indulgence towards trustees; it presupposes a careful, indeed deliberate, assessment of the trustee's fundamental duties as a fiduciary, and a sensitivity to the fact that the foremost, and perhaps only, protection of the beneficiary is that the person, who with considerable powers is administering the trust assets, must act with 'vigilance, prudence and sagacity'.

[321] Trusts Report, *ibid.*, at 39, and Draft Trustee Bill, s. 69.

Under our earlier proposals respecting liability, the principles respecting breach of trust will continue to apply to estate trustees. In our view, the reasons supporting the recommendations for relief of trustees that we have made in the Trusts Report apply with equal force to estate trustees. As we have explained, this would entail allowing courts to grant relief not only for technical breaches of trust, but in other circumstances in which an estate trustee may be held liable.[322] We therefore recommend that the provisions of the draft *Trustee Act* providing for relief for breach of trust should apply to estate trustees.

The relieving provisions of the present *Trustee Act* with respect to the payment of debts and contingent liabilities apply only to personal representatives. Section 50 addresses relief from liability arising in connection with the payment of debts. It provides as follows:

> 50.—(1) On the administration of the estate of a deceased person, in the case of a deficiency of assets, debts due to the Crown and to the personal representative of the deceased person, and debts to others, including therein debts by judgment or order, and other debts of records, debts by specialty, simple contract debts, and such claims for damages as are payable in like order of administration as simple contract debts shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein prejudices any lien existing during the lifetime of the debtor on any of his property.
>
> (2) Where a personal representative pays more to a creditor or claimant than the amount to which he is entitled under subsection 1, the overpayment does not entitle any other creditor or claimant to recover more than the amount to which he would be entitled if the overpayment had not been made.
>
> (3) Where a personal representative pays more to a creditor or claimant than the amount to which he is entitled under subsection 1, the court may relieve the personal representative either wholly or partly from personal liability if it is satisfied that he has acted honestly and reasonably and for the protection or conservation of the assets of the estate.

Section 50(3) deals with the situation where a personal representative is sued personally by a creditor or claimant who does not receive his *pari passu* share of the debt that he is owed because the personal representative has made an overpayment to another creditor or claimant.

The relationship between section 50(3) and section 35 of the *Trustee Act*, the general relieving provision, is unclear. As we have explained, section 35 deals with personal liability for breach of trust, and applies where a trustee has acted "honestly and reasonably, and ought fairly to be excused". By contrast, while section 50(3) also requires a personal representative to

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[322] Both the marginal note to s. 35 of the present *Trustee Act* and the marginal note to s. 69 of the Commission's revised Trustee Bill are "Relief of trustees committing technical breach of trust". While perhaps reflecting the original intention of a relieving provision, neither accurately reflects the applicability of the provision.

have acted "honestly and reasonably", there is the requirement that he has acted "for the protection or conservation of the assets of the estate".

Whether section 35 of the *Trustee Act* would apply in the circumstances addressed by section 50(3) depends on how the action by the creditor or claimant is characterized. It would seem that the action against the personal representative would be an action for debt, and it is far from certain whether a court would consider an overpayment to a creditor as a breach of trust.

We are in agreement with the basic policy implemented by section 50(3) of the *Trustee Act*. Since there appears to be doubt whether the judicial power to relieve for breach of trust would apply in these circumstances, we are of the view that this matter should be addressed specifically by legislation.

As we have indicated, under the present law, there are two different statutory standards governing relief from liability, the one set out in the general relieving provision, section 35, and the one prescribed in section 50(3). We can see no reason for different tests determining whether an estate trustee should be relieved from personal liability for a failure to act properly. Moreover, we consider the standard set out in section 50(3)—"has acted honestly and reasonably and for the protection or conservation of the assets of the estate"—to be obscure and difficult to understand. Indeed, one might well question how a person is be found to have acted "for the protection or conservation of the assets of the estate" when he has made a payment and, in particular, an overpayment. The standard for relief of estate trustees that we endorsed earlier should apply in these circumstances. Accordingly, we recommend that, in the case of an insolvent estate, where an estate trustee pays more to a creditor or claimant than the amount to which he is entitled, the court should be empowered to relieve the estate trustee either wholly or partly from personal liability if it is satisfied that he has acted honestly and reasonably and ought fairly to be excused for the payment.

The third matter in respect of which the *Trustee Act* provides for relief from personal liability relates to certain types of contingent liability. Sections 51 and 52 of the *Trustee Act* provide as follows:

> 51.—(1) Where a personal representative, liable as such to the rents, or upon the covenants or agreements contained in a lease or agreement for a lease granted or assigned to the testator or intestate, has satisfied all liabilities under the lease or agreement for a lease, which accrued due and were claimed up to the time of the assignment hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and has assigned the lease, or agreement for lease, to a purchaser thereof, he may distribute the residuary estate of the deceased to and among the parties entitled thereto, without appropriating any part or any further part thereof, as the case may be, to meet any future liability under the lease or agreement for lease.

(2) The personal representative so distributing the residuary estate is not personally liable in respect of any subsequent claim under the lease or agreement for lease.

(3) Nothing in this section prejudices the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom they have been distributed.

52.—(1) Where a personal representative, liable as such to the rent or upon the covenants or agreements contained in any conveyance on chief rent or rentcharge, whether any such rent is by limitation of use, grant or reservation, or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate, has satisfied all liabilities under the conveyance, or agreement for a conveyance, which accrued due and were claimed up to the time of the conveyance by him hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and has conveyed such property, or assigned such agreement for conveyance to a purchaser thereof, he may distribute the residuary estate of the deceased to and among the persons entitled thereto, without appropriating any part or any further part thereof, as the case may be, to meet any further liability under the conveyance or agreement for conveyance.

(2) A personal representative so distributing the residuary estate is not personally liable in respect of any subsequent claim under the conveyance or agreement for conveyance.

(3) Nothing in this section prejudices the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom they have been distributed.

These complex provisions respond to a narrow problem. At common law, a personal representative of a lessee was liable in a representative capacity on the covenants of the lease, to the extent of the lessee's assets. This representative liability lasted for the whole term of the lease, and continued despite any assignment of the lease. Consequently, it was risky for a personal representative to distribute the lessee's assets to the beneficiaries without setting aside a fund to cover any possible liability that might arise from a future breach of the lease. If a fund were not set aside, the personal representative would be personally liable to the lessor if there were not sufficient assets remaining in the estate to cover the liability. To meet this problem, the practice was to set aside a fund, taken from the residuary estate, and pay it into court, where it remained until all claims were paid or until the expiry of the limitation period within which claims could be brought; the fund was then paid to the beneficiaries.[323]

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[323] Bentley, McNair and Butkus, *Williams and Rhodes Canadian Law of Landlord and Tenant* (6th ed. 1988), Vol. 2, at 15-3 to 15-4; Williams, Mortimer and Sunnucks, *supra*, note 75, at 601; and Megarry and Wade, *supra*, note 229, at 729-730.

A similar practice was followed where personal representatives became personally liable under the covenants of the lease. Personal liability to the lessor arises where an executor or administrator has taken possession of the lands subject to the lease, for the law treats her as if she were an assignee of the lease.

The practice of setting aside a fund for possible future claims postponed distribution of the estate, and placed the full weight of delay on residuary legatees.

Legislation was enacted in 1859 to deal with the situation where an executor or administrator is liable in a representative capacity.[324] Sections 51 and 52 of the *Trustee Act* are the present versions of that provision. Certain features of these provisions bear emphasizing. The basic scheme of the provisions is that, where a personal representative has satisfied all existing claims, has set apart a fund sufficient to answer any future claim that may be made in connection with "any fixed and ascertained sum covenanted or agreed . . . to be laid out on the property", and has transferred the property to a purchaser, she may distribute the residuary estate to the persons entitled to it without appropriating any of it to meet future liabilities. Where a personal representative distributes the residuary estate in accordance with these prerequisites, she cannot be held personally liable if there is any later claim, for example, by a lessor. However, the protection given to personal representatives does not impair the right of a lessor to follow the assets of the deceased into the hands of persons to whom they have been distributed.

The modern English provision applies in the same circumstances.[325] In other respects, however, it differs. First, it expressly applies to assignments by a personal representative to a mortgagee as well as to a purchaser. Second, it also applies to assignments by ordinary trustees. Third, there is no reference to the archaic concept of chief rents. Finally, the English provision combines section 51 and 52 in a single section.

Sections 51 and 52 of the *Trustee Act* reflect a concern that the ease of administration not be impeded by the existence of contingent liabilities. We share this concern. Moreover, we are of the view that the policy of these provisions is applicable to all situations where an asset of the estate is subject to continuing liability. In these situations, to protect themselves, personal representatives must set aside a fund to meet possible liability, or distribute the assets and obtain an indemnity from the beneficiaries, or obtain an order from the court directing the administration of the estate.[326] In the case of commercial leases, the first alternative may be impracticable, or

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[324] *Lord St. Leonard's Act*, *supra*, note 13.

[325] *Trustee Act 1925*, *supra*, note 15, s. 26.

[326] Widdifield, *supra*, note 102, at 62-63.

at least extremely difficult, given the complexity of modern leases, particularly so-called "net" and "net, net" leases. The last of the three alternatives is more theoretical than real, for administration orders are rarely used in Ontario.

Where an estate is under a long-term obligation and that obligation may be transferred to another, the person to whom that obligation is owed will not be disadvantaged if the transfer can be effected only with her prior approval. In such a case, the liability of the estate trustee should end, which will allow her to distribute the estate. Accordingly, we recommend that, where an estate trustee holds as an asset a long-term lease, mortgage or other instrument that imposes upon the estate a liability beyond one year from the death of the deceased, and she assigns this asset to a person approved by the person to whom the estate otherwise would have been liable for the full term of the instrument, the liability of the estate trustee for further payment under the instrument should cease from the moment of the assignment. The person to whom the estate otherwise would have been liable for the full term of the instrument should not be entitled to withhold her approval arbitrarily. In making this proposal, we acknowledge that we are accepting that considerations of contract ought to defer to the policy in favour of the ease of administration of estates.

(c) Exoneration of Estate Trustees from Liability by the Terms of the Will

An exoneration clause is a provision in a will that wholly or partially exonerates a personal representative from liability for a loss arising in the course of his administration of the estate. Such a clause may be inserted at the request of an executor, as a condition of his agreement to accept the office, or on the initiative of a testator in order to persuade a person to act without compensation. As with exoneration clauses in trust instruments,[327] it would appear that these clauses are common in Ontario.

There is a dearth of judicial authority on the effect of exoneration clauses. However, the validity of such clauses would appear to depend on how broadly they are drawn and the conduct to which they are applied. Wide clauses that purport to relieve a personal representative from liability for all losses, regardless of the degree of fault, would be pronounced invalid as fundamentally incompatible with the fiduciary nature of the office.[328] In several nineteenth century Scottish cases[329]—which were approved in *Re*

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[327] Trusts Report, *supra*, note 3, at 39.

[328] Waters, *supra*, note 43, at 756-57.

[329] *Knox v. Mackinnon* (1888), 13 App. Cas. 753 (H.L.); *Carruthers v. Carruthers*, [1896] A.C. 659 (H.L.); and *Wyman v. Paterson*, [1900] A.C. 271 (H.L.).

Poche,[330] a 1983 decision of the Alberta Surrogate Court—the House of Lords held that an exoneration clause was ineffective to relieve a trustee from liability for loss resulting from "gross negligence" or conduct inconsistent with good faith. However, it has been suggested that, to the extent that the conduct in question may be characterized simply as negligence, as distinct from "gross negligence", an exoneration clause may be valid.[331]

In the *Report on the Law of Trusts*, we considered the exoneration of trustees by the terms of the trust instrument.[332] In particular, we expressed concern about the ability of a trust instrument to exonerate a trustee from liability for negligence. We stated that we saw no reason that would justify shifting the risk of loss due to negligence to the beneficiaries. We observed that a professional trustee should be carrying insurance, and a non-professional trustee who is so unsure of his competence that he believes that such safeguards are required should not accept the office. In light of our recommendation to retain the judicial relieving power, we questioned the desirability of a clause in the trust instrument exonerating trustees from liability for negligence.[333]

In the Trusts Report, we recommended that no term in a trust instrument, or in an oral declaration of trust, should be valid to the extent that it purports to exonerate trustees from liability for failure to exercise the degree of care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another person.[334] Following from our recommendation in favour of requiring a higher standard of care for professional trustees, we recommended further that no term in a trust instrument, or in an oral declaration of trust, should be valid to the extent that it purports to exclude or lower the standard of knowledge or skill required by trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all circumstances is relevant to the administration of the trust.[335]

In our view, these proposals should apply as well to estate trustees, and we so recommend.

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330 (1983), 50 A.R. 264, 6 D.L.R. (4th) 40 (*obiter dictum*).

331 Cullity, "Trustees' Duties, Powers and Discretions—Exercise of Discretionary Powers", in *Special Lectures of the Law Society of Upper Canada*[:] *Recent Developments in Estate Planning and Administration* (1980) 13, at 20. But see Waters, *supra*, note 43, at 756-57, who states that exoneration clauses are valid, but argues that courts would interpret clauses purporting to exclude liability for negligence as not having that intention.

332 *Supra*, note 3, at 39-42.

333 *Ibid.*, at 40.

334 *Ibid*, at 41-42, and Draft Trustee Bill, s. 7(a).

335 *Ibid*, at 42, and Draft Trustee Bill, s. 7(b).

5. COMPENSATION AND REIMBURSEMENT

(a) Introduction

Compensation is paid to personal representatives for the time, efforts, and care expended on the activities of the estate. The right of a personal representative to compensation may arise from various sources. A right is conferred under section 61 of the *Trustee Act*. A provision in the will may fix compensation, or a personal representative may make an agreement respecting compensation with the deceased or the beneficiaries.

Compensation is to be distinguished from moneys paid to reimburse a personal representative for expenses incurred in the administration of the estate. In the discussion that follows, we focus on issues relating to the compensation of estate trustees. At its conclusion, reimbursement will be considered.

In the *Report on the Law of Trusts*,[336] we proposed recommendations to establish a general framework governing the compensation of trustees. We believe that these proposals are apposite in this context as well, and we therefore recommend that the relevant provisions of the draft *Trustee Act* should apply to estate trustees. In view of the substance of these recommendations, we see little purpose in reiterating the discussion that appears in the Trusts Report. Except for our recommendation to allow interim compensation or "pre-taking" of compensation by trustees, our recommendations would consolidate and rationalize the existing provisions of the *Trustee Act* bearing upon the compensation of trustees and personal representatives. The recommendation to permit interim compensation under certain controls, which may be more controversial, is fully explained in the Trusts Report.

Rather than recapitulating our discussion of compensation, we prefer to set out the relevant provisions of the draft *Trustee Act*. Sections 71-73 provide as follows:

> 71.—(1) Trustees are entitled to such fair and reasonable compensation for their work and time spent on the trust as a court of competent jurisdiction on application or on the passing of accounts may award.
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> (2) Trustees who possess or because of their profession, business or calling have professional skills and have rendered necessary professional services to the trust, apart from their duties and powers as trustees, are entitled to such additional compensation for such services as a court of competent jurisdiction may award.
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> 72.—(1) Subject to subsections (2) and (3), and any regulation made under section 73, trustees may, from time to time during the administration of the trust, pay to themselves or any of them from the assets of the trust such sum as

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[336] *Ibid*, at 255-61. See, generally, Hull and Cullity, *supra*, note 1, at 384-95.

in their opinion is fair and reasonable compensation for their work and time spent on the trust during the period of time to which the payment relates.

(2) Trustees who take compensation under subsection (1) must,

(a) at the time of the taking give notice to the beneficiaries of the sum taken and an account of the services rendered; and

(b) on an application or on the passing of accounts, satisfy a court having jurisdiction that the sum taken was fair and reasonable.

(3) Where a court of competent jurisdiction determines that the sum taken as compensation under subsection (1),

(a) was fraudulently taken, the court shall order it to be returned to the trust, and may deny any compensation to the trustees;

(b) was not fair and reasonable, the court shall determine what is fair and reasonable and order the difference between the sum taken and the sum fixed by the court be returned with interest to the trust.

(4) In any application or passing of accounts under this section, a court of competent jurisdiction may make any order as to costs or otherwise as the court considers proper in the circumstances.

73. The Lieutenant Governor in Council may make regulations,

(a) prescribing guidelines respecting the sums payable as compensation to trustees; and

(b) respecting the taking of compensation under section 72.

As we have indicated, these provisions constitute only a very general framework for the granting of compensation by a court of competent jurisdiction. They establish the entitlement of trustees to compensation, including interim compensation, and declare that the standard governing a judicial award is that it must be "fair and reasonable". However, with respect to estate trustees, there are several other important issues relating to compensation that require resolution, which is apparent from an examination of the present law respecting personal representatives. It is to these specific questions that we now turn.

(b) Method of Calculating Compensation

Section 61(1) of the *Trustee Act* provides that a personal representative "is entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the estate as may be allowed by a judge". This articulates a very general criterion that, by itself, offers little direction to the courts charged with the responsibility of determining the amount of compensation. Their task has been eased by the development of factors to guide this determination, and the practice of relying on the

application of certain percentages to the items in the estate accounts, as explained below.

The classic statement of the relevant factors, which has been continuously applied in Canada,[337] appeared in *Re Toronto General Trusts Corp. and Central Ontario R.W. Co.*:[338]

> [T]he following circumstances appear proper to be taken into consideration in fixing the amount of compensation: (1) the magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied in performing its duties; (4) the skill and ability displayed; (5) the success which has attended its administration.

While this statement sets out the position in law, in practice the amount of compensation is determined by the application of percentages to the income and capital receipts and disbursements that appear in the accounts. In Ontario, the following "usual" percentages have been recognized:[339]

(a) income receipts—2½%; income disbursements—2½%

(b) capital receipts—2½%; capital disbursements—2½%

(c) management fee—⅖ of 1% of the property under administration per annum

While these percentages have been accepted by the courts as a useful guide, it must be emphasized that they are not required to be applied. Their purpose is to facilitate the determination of a "fair and reasonable allowance". Reliance is to be placed on the percentages only insofar as they can be applied to achieve this result.[340]

Compensation calculated on the basis of the receipts and disbursements of items of capital and income may be supplemented by an additional management fee, which is a "usual" percentage per year of the property being administered. The theoretical justification for the fee is that, in some cases, the application of the "usual" percentages to receipts and disbursements does not produce adequate compensation for administration

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337 *Re Sproule Estate* (1979), 13 A.R. 420, at 424, 95 D.L.R. (3d) 458, at 461 (S.C. App. Div.).

338 (1905), 6 O.W.R. 350 (Weekly Ct.), at 354.

339 *Re Cohen* (1977), 1 E.T.R. 80 (Ont. Surr. Ct.).

340 *Re Atkinson*, [1952] O.R. 685, [1952] 3 D.L.R. 609(C.A.), aff'd *sub. nom. National Trust Co. v. Public Trustee,* [1953] 2 S.C.R. 41, [1953] 3 D.L.R. 497; *Re Sproule Estate*, *supra*, note 337; *Re Jones* (1973), 1 E.T.R. 88, at 91 (Ont. Surr. Ct.); and *Re Welbourn* (1979), 96 D.L.R. (3d) 76, [1979] 3 W.W.R. 113 (Alta. Surr. Ct.).

of the estate.[341] In particular, disbursements made in investing the capital funds of the estate and liquidation of such investments do not attract compensation.[342]

The attitude of the courts to allowing a management fee in addition to the other "usual" percentages is unclear. There are statements that such a fee may be justified in exceptional circumstances;[343] yet it appears that, as a matter of practice, a management fee is awarded unless special circumstances render it inappropriate.[344]

Subject to a single reservation, we believe that the present method of calculating compensation for personal representatives is satisfactory, and should continue to apply to estate trustees. We are in accord with the fundamental principles developed by the courts, which allow for the application of percentages only insofar as they represent fair and reasonable compensation in the circumstances of the individual case, according to the statutory standard.

It will be necessary periodically to review, and if appropriate, to adjust the "usual" percentages. Such adjustments may involve various refinements. Differential rates may be established for corporate and individual estate trustees; sliding scales may be introduced; care and management fees may be refined. On the whole, we regard modifications of this nature essentially as matters of detail, which should not be incorporated in a statute, but left to regulation, which can be more easily amended to respond to changing circumstances.

We therefore recommend that, as a guide to a court in determining the "fair and reasonable compensation" to which an estate trustee is entitled pursuant to section 71 of the proposed *Trustee Act*, regulations made under the authority of section 73 of the proposed Act should prescribe the "usual" percentages. We further recommend the establishment of a broadly-based committee, representing all members of the community affected by this

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341 The source of authority for a management fee can be found in *Re Berkeley's Trusts* (1879), 8 P.R. 193 (Ch.), at 197, where Blake V.C. stated "that is not unreasonable to make some allowance for services not covered by the commission awarded".

342 In *Re Berkeley's Trusts*, *supra*, note 341, at 197, Blake V.C. said that trustees are not entitled to commission for the investment or reinvestment of the funds of the estate because it would encourage a continued changing of the investments, which may be most injurious to the estate. See, also, *Neilson v. National Trust Co.*, [1954] S.C.R. 88, where the court approved this rule, but suggested that the enhancement of the value of the estate by continual reinvestment is a factor to be considered when fixing a management fee.

343 *Re Kennedy*, [1944] O.W.N. 734 (H.C.J.); *Re Sproule Estate*, *supra*, note 337; and Widdifield, *supra*, note 102, at 321.

344 Widdifield, *supra*, note 102, at 320, and Hull and Cullity, *supra*, note 1, at 393-94.

matter, to advise the Attorney General as to what percentages are appropriate. Regulations should be adopted after this committee reports to the Attorney General.

(c) Compensation Fixed by the Will

In Ontario, the statutory right to compensation under section 61 of the *Trustee Act* does not arise where the amount of the allowance to the personal representative is fixed in the will.[345] In such a case, the personal representative is entitled to precisely the amount established by the will.[346] In addition, where a legacy is given to an executor, there is a presumption that it is intended to be given in lieu of compensation; if the presumption can be rebutted, and it can be shown that the legacy was given to the executor independently of that office, he can apply for compensation under the *Trustee Act*.[347]

Where a clause in a will fixes compensation, it applies only to the named executors. If successor executors are appointed subsequently, they are not limited by a provision of this kind and, in the absence of a contrary provision in the will, may seek compensation under the statutory authority.[348] Moreover, where the persons are appointed both executors and trustees, the will may stipulate that their compensation is fixed only in their capacity as trustees, in which case, they may apply for compensation in their capacity as executors.

If a named executor is unwilling to act for the amount of compensation fixed in the will, he may make a contractual agreement with the beneficiaries for further remuneration. We shall discuss this alternative in due course.[349] Alternatively, he may renounce the office, in which case the court generally will have jurisdiction to fix allowances for the personal representatives who are substituted. There is also a *dictum* stating that, in order to prevent damage to the estate, the court has jurisdiction to award compensation to an executor under the statute on condition that he relinquish the compensation that is fixed in the will, provided that an application is made before probate and there is clear evidence of the inadequacy of the compensation

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345 Section 61(5) of the *Trustee Act*, *supra*, note 32, provides that "[n]othing in this section applies where the allowance is fixed by the instrument creating the trust".

346 "[R]egardless of what responsibilities he may have discharged, or the extent of the duties performed, he is entitled to the amounts fixed, no more and no less": Hull and Cullity, *supra*, note 1, at 385. See *Re Anderson* (1985), 53 O.R. (2d) 36 (Surr. Ct.).

347 Hull and Cullity, *supra*, note 1, at 385-86, and Widdifield, *supra*, note 102, at 311-16.

348 *Re Robertson*, [1949] O.R. 427, [1949] 4 D.L.R. 319 (H.C.J.) (subsequent reference is to O.R.).

349 *Infra*, this ch., sec. 5(d)(i).

fixed in the will.[350] While this statement was cited with approval in a single case,[351] it has never been applied or discussed since in a reported decision.

In our view, the present law respecting provision for compensation raises a basic issue concerning whether, and the extent to which, the will should be determinative, foreclosing challenge and judicial review. This fundamental issue involves two questions, which examine the issue from different perspectives. The first question is whether an estate trustee named in the will should continue to be bound by the compensation fixed in the will, notwithstanding that the amount is inappropriately low. The second question is whether the estate trustee named in the will should continue to be able to rely on the provision in the will.

With respect to the first question, it is not difficult to imagine circumstances in which the prescribed compensation may be inadequate. For example, because of a lapse of time and the effect of inflation between the date of making of the will and the death of the testator, the provision in the will may have become insufficient; the administration of the estate may be more complex than anticipated at the date of the making of the will; the will may provide for small or no compensation on the basis that the estate trustee was to obtain another benefit under the will, and that benefit may prove to be smaller than expected or non-existent for some reason; or the will may simply provide inadequate compensation for the estate trustee. While, in practice, such a provision can be avoided by a contractual arrangement with beneficiaries or by renouncing and having substitute estate trustees appointed, these methods are not entirely satisfactory. It may be impossible for the estate trustee to make a suitable contractual arrangement with beneficiaries of the estate, and the persons named as estate trustees may be the most appropriate persons to assume that responsibility, so that it may not be in the best interests of the estate for them to renounce and for others to be substituted. Finally, we should emphasize that the *dictum* allowing the court to award compensation under the statute if the estate trustee renounces his claim under the will is not clearly established.

The other provinces have taken various approaches to this problem. Like Ontario, Alberta,[352] British Columbia,[353] New Brunswick[354] and Saskatchewan[355] provide that the statutory jurisdiction of the court to allow compensation is removed where the compensation is fixed by the will. By

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[350] *Williams v. Roy* (1885), 9 O.R. 534 (Ch.), at 539, *per* Boyd C.

[351] *Re Robertson*, *supra*, note 348, at 433-34.

[352] *Trustee Act*, R.S.A. 1980, c. T-10, s. 44.

[353] *Trustee Act*, R.S.B.C. 1960, c. 398, s. 91.

[354] *Trustee Act*, R.S.N.B. 1973, c. T-15, s. 38(4).

[355] *The Trustee Act*, R.S.S. 1978, c. T-23, s. 83.

contrast, legislation in Newfoundland[356] and Nova Scotia[357] does allow a personal representative to renounce his claim to compensation provided in the will. Section 54 of the Newfoundland *Trustee Act* provides:

> 54. Where any provision shall be made by any will for specific compensation to an executor, or the deed or other instrument creating the trust makes provision for compensation to the trustee, the same shall be deemed a full satisfaction for his services in lieu of any compensation as mentioned in Section 53 or his share thereof, unless such executor or trustee shall, by a declaration under his hand, filed in the said court, renounce all claim to such specific legacy or compensation so provided. Such declaration shall be filed before probate or administration taken, or the acceptance of the office of trustee.

Section 77 of the Nova Scotia *Probate Act* provides:

> 77. When any provision is made by any will for specific compensation to an executor, the same shall be deemed a full satisfaction for his services in lieu of any commission, or his share thereof, unless such executor, within twelve months from the date of probate, by declaration under his hand filed with the registrar, renounces all claim to such specific compensation.

In 1976, Manitoba repealed a provision[358] identical to section 61(5) of the Ontario Act and replaced it with the following:[359]

> 90.–(5) Any agreement, instrument or document executed by a testator or any person on his behalf fixing the amount of compensation or allowance that may be paid to a trustee, guardian or personal representative with respect to the administration of the estate of the testator, is not valid unless it is approved by a judge of a Surrogate Court.

It seems that, while the Newfoundland and Nova Scotia provisions deal with the situation where the personal representative wants to obtain compensation under the statutory jurisdiction, rather than that provided in the will, the Manitoba provision addresses circumstances where the personal representative wants to obtain the compensation stipulated in the will.

We believe that the existing law in Ontario should be altered. By offering estate trustees a choice between accepting the compensation provided in the will or renouncing their office, it demonstrates a rigidity and insensitivity

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356 *The Trustee Act*, R.S.Nfld. 1970, c. 380.

357 *Probate Act*, R.S.N.S. 1989, c. 359, s. 77.

358 *The Trustee Act*, R.S.M. 1970, c. T160, s. 90(5), as en. by S.M. 1976, c. 49, s. 1.

359 See now R.S.M. 1987, c. T160, s. 90(5). Section 61(5) of the Ontario *Trustee Act*, *supra*, note 32, provides that "[n]othing in this section applies where the allowance is fixed by the instrument creating the trust".

that is potentially unfair both to estate trustees and to estates and beneficiaries. We think it preferable to allow an estate trustee to waive the compensation stipulated in the will and to rely on the statutory jurisdiction of the court to award compensation subject, however, to the approval of the court.

In these circumstances, judicial sanction is critical as a prophylactic measure. The estate trustee is seeking remuneration, despite the fact that the matter of compensation has been addressed by the will. There should be some assurance that the intentions of the testator are not unreasonably and unjustifiably frustrated. In our view, an estate trustee should be permitted by the court to refuse the stipulated compensation and seek statutory compensation only where she can demonstrate that, in the circumstances, it would be unreasonable. We expect that an important factor would be whether the provision in the will was inserted as a result of a bargain between the estate trustee and deceased.

In conclusion, therefore, we recommend that, where the compensation of an estate trustee is fixed by the will the estate trustee named in the will should be entitled to apply to the court for an order permitting her to waive her right to the compensation and to seek compensation under the court's statutory jurisdiction. The court should be empowered to allow the estate trustee to waive the compensation fixed by the will only where it appears to the court that the compensation would be unreasonable in the circumstances.

As we have indicated, the second issue respecting the effect of a provision in the will fixing compensation is whether estate trustees should be absolutely entitled to take the compensation fixed in the will. Circumstances may arise in which other persons would be affected by a compensation clause, if such a clause were to entitle an estate trustee to obtain the amount fixed. In chapter 4, we recommend that, in the case of an insolvent estate, reasonable testamentary expenses and the costs of administration—which would include compensation—should be a charge on the unencumbered portion of the assets of the deceased.[360] Compensation will therefore be paid in priority to legacies.

If a compensation clause were to entitle an estate trustee to the amount fixed, a testator could defeat her creditors by the simple expediency of naming a person as estate trustee and providing for that person to receive compensation sufficient to accomplish that goal. Another group of persons whose interests may be unjustifiably compromised if a compensation clause were to have this effect are persons who are found to be "dependants" within the meaning of Part V of the *Succession Law Reform Act*, for they would be able to have recourse to the estate only after the compensation has been paid to the estate trustee.

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[360] *Infra*, ch. 4, sec. 2(c).

The answer to this problem can be found in our recommendations respecting the nature of an estate trustee's compensation, which appear later in this chapter. For reasons we shall explain, we recommend that, where there is a deficiency of assets, the estate trustee's compensation should be deemed to be an administrative expense and have priority over legacies and other unsecured debts, to the extent that it does not exceed what would be allowed as fair and reasonable compensation under the court's statutory jurisdiction, and that any excess over that amount should be treated as a legacy, and should be subject to the order of application of assets. We also recommend that the excess should be paid in priority to other legacies, subject to the *Succession Law Reform Act.*

Before turning to discuss issues relating to compensation fixed by agreement, we wish to advert to a subsidiary issue respecting compensation fixed by the will.

At present, the position of an executor who witnesses a will in which his compensation is fixed is unclear. While no Ontario reported case addresses this question, it would appear that section 12(1) of the *Succession Law Reform Act* would render a clause fixing compensation void,[361] unless the executor, pursuant to section 12(3) satisfies the court that he has not exercised any improper or undue influence upon the testator. In England, compensation clauses in favour of executors who witness the will have been held void as a consequence of the application of statutory provisions equivalent to section 12(1) of the Ontario Act.[362]

The policy of section 12 of the *Succession Law Reform Act* is to ensure that the testator is not subject to "improper or undue influence" in deciding the disposition of his estate by persons who, by virtue of being chosen as witnesses, presumably enjoy the trust and confidence of the testator. By making any gift to them void, unless the court is satisfied that such influence has not been exerted, overreaching, in theory, should be discouraged.

We believe that this policy is inappropriate insofar as it may apply to all clauses fixing compensation. Circumstances may make it entirely reasonable, and indeed sometimes necessary, for the executor to witness the will, and we see no reason to nullify a clause fixing his compensation if it otherwise conforms to the fair and reasonable standard that we have generally endorsed. Accordingly, we recommend that section 12(1) of the *Succession Law Reform Act* should be amended to read as follows:

> 12.—(1) Where a will is attested by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for the payment of debts or a

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[361] Widdifield, *supra*, note 102, at 114, and Feeney, *The Canadian Law of Wills*: *Probate* (3rd ed., 1987), Vol. 1, at 101, *n*. 193.

[362] *Re Barber* (1886), 34 Ch. D. 77, 56 L.J. Ch. 216; *Re Pooley* (1888), 40 Ch. D. 1, [1886-90] All E.R. Rep. 157 (C.A.); and *Re Thorley* [1891] 2 Ch. 613 (C.A.).

provision fixing the compensation of an estate trustee to the extent that such compensation does not exceed the amount that would have been awarded by the court under its statutory jurisdiction, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,

(a) the person so attesting,

(b) the spouse, or

(c) a person claiming under either of them,

but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

Section 12(2) of the *Succession Law Reform Act* should be amended along the same lines.

(d) Compensation Fixed by Agreement

(i) With the Beneficiaries

As we have indicated, a personal representative who is dissatisfied with the compensation fixed in the will, or indeed whose compensation has not been addressed in the will, may enter into an agreement with the beneficiaries of the estate with respect to this matter. Subject to the general law of contract, such an agreement will be binding on the beneficiaries who are party to it.

What effect the agreement may have on the jurisdiction of the court to order compensation under section 61(5) of the *Trustee Act* is unclear. There is an isolated *dictum* stating that the statutory jurisdiction is ousted by a contractual arrangement between a personal representative and the beneficiaries of an estate.[363] Opposed to it are cases in which courts take such an arrangement into account in determining the allowance to be given to an executor under the statutory jurisdiction.[364] If, pursuant to the contractual arrangement, the executor has obtained an amount equal to, or greater than, that which would be allowed under the statutory jurisdiction, a court is most unlikely to permit further compensation in the exercise of that jurisdiction.[365] Where, however, the agreement was concerned only with part of his duties

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[363] *Re Taylor*, [1967] 2 O.R. 557 (Surr. Ct.), at 562. See, also, *Re Cook* (1974), 5 O.R. (2d) 388 (Surr. Ct.), at 395.

[364] See *Dart v. Dart* (1915), 25 Man. R. 258, 23 D.L.R. 399 (Man. C.A.), where one reason for refusal to allow remuneration was that the trustee was held to have agreed to act gratuitously.

[365] *French v. Toronto General Trusts Co.* (1923), 53 O.L.R. 336, [1921] 1 D.L.R. 288 (H.C. Div.).

as personal representative, the court may exercise its statutory jurisdiction to award additional compensation.[366]

In our view, there are two matters that require attention: first, the enforceability of these agreements should be made subject to certain prerequisites; and second, the effect of these agreements on the statutory jurisdiction to award compensation should be clarified.

Turning first to enforceability, we are of the view that these agreements are useful. They would be binding and enforceable according to the principles of general contract law, subject to the recommendations that we made in the *Report on Amendment of the Law of Contract*. However, we favour the imposition of a formality requirement, namely that, in order for the agreement to be binding on the estate trustee and the beneficiaries, it should be written and should be signed by the estate trustee and the beneficiaries to be bound.[367]

With respect to the effect of an agreement on the jurisdiction to allow "fair and reasonable compensation", we recommend that it should not oust the court's statutory jurisdiction, but should be taken into account in the exercise of that jurisdiction. If, in the case of a solvent estate, all the beneficiaries enter into an agreement giving the estate trustee greater compensation than otherwise would be allowed under the statutory jurisdiction, the court ordinarily would allow this amount. However, if the estate is insolvent and only some of the beneficiaries concluded an agreement that provided for compensation greater than would be granted by the court under its statutory jurisdiction, one would anticipate that a court would not allow this amount because it would prejudice the creditors. Moreover, regardless of whether the estate is solvent, where only some of the beneficiaries have made an agreement providing for greater compensation, one would expect a court not to follow the agreement in awarding compensation under its statutory jurisdiction, for that would operate to the prejudice of the beneficiaries who were not party to the agreement.[368]

Accordingly, we recommend that a contract between the estate trustee and the beneficiaries of an estate regarding compensation should not oust the jurisdiction of the court to allow compensation under section 71 of the

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366 *Re Anderson* (1924), 55 O.L.R. 527 (H.C.), varied (1924), 56 O.L.R. 228 (C.A.).

367 Under general principles of contract law, an oral agreement between the estate trustee and beneficiaries may be binding in some circumstances.

368 For example, an estate trustee may have made an agreement with 2 of 4 beneficiaries to be paid $5,000. Only $3,000 would be ordered by the court in the exercise of its statutory jurisdiction. The estate applies to the court for compensation under that jurisdiction in order to establish a second basis for his compensation and to be authorized to take it from the estate. This would obviate the necessity of seeking payment from the beneficiaries, which perhaps may necessitate bringing actions, should they refuse to pay. In such a situation, we envisage that the court would order that she recover $3,000. The estate trustee would be obliged to seek the balance from the beneficiaries with whom she has contracted.

proposed *Trustee Act*, but the court should be empowered to consider the agreement in exercising that jurisdiction.

(ii) With the Deceased

It would appear that, under the present law, effect will not be given to an agreement between the deceased and the personal representative concerning compensation, where it is not incorporated into the will. The agreement is not binding on either the personal representative or the beneficiary. Nor does it oust the jurisdiction of the court to allow compensation under the *Trustee Act*.[369]

We are in substantial agreement with the present law. We believe that, in order for an agreement respecting compensation to be effective, it should be incorporated in the will in conformity with the general law respecting wills.

We therefore recommend that any agreement between the deceased and an estate trustee respecting compensation should not bind the estate unless it is incorporated in the will.

(e) Nature of Compensation

Under the present law, there is uncertainty respecting the nature of compensation that is to be paid to a personal representative, particularly where the amount is fixed by a will. The specific issue is whether compensation should be treated as an ordinary legacy or an administrative expense. The significance of this issue arises in circumstances where there is a deficiency of assets. If compensation is considered to be an ordinary legacy, it will abate with the other legacies; if treated as an administrative expense, compensation will take priority over other unsecured debts of the estate, and give the personal representative a charge upon the estate's assets to secure payment.

While it is clear that compensation allowed to a personal representative under the statutory jurisdiction is treated as an administrative expense,[370] the position of compensation that is fixed in the will has not been firmly established. In England, a provision in a will authorizing compensation to personal representatives is treated as a legacy.[371] In Canada, a different view of this matter appears to have been taken.

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[369] *Re Taylor*, *supra*, note 363, and *Re Cook*, *supra*, note 363. For a discussion, see Hull, "Agreements for Executors' and Trustees' Compensation" (1975), 2 E.T.Q. 249.

[370] *Harrison v. Patterson* (1865), 11 Gr. 105 (Ch.), and *Life Association of Scotland v. Walker* (1876), 24 Gr. 293 (Ch.).

[371] *Ellison v. Airey* (1748), 27 E.R. 924. (L.C.).

As a matter of general policy, we question treating compensation fixed in a will like a legacy. In our view, it appears absurd that an executor who has been given compensation by a provision in the will should be in a worse position in the event of a deficiency of assets than an executor in whose favour there is no such provision; as we have indicated, in the case of the latter, the law is clear that statutory compensation is to be treated as an administrative expense. We believe that, to the extent that the stipulated compensation is fair and reasonable, the estate trustee should be protected in the event of a deficiency of assets. However, any excess of that amount over what would otherwise be determined to be fair and reasonable should not be regarded as compensation, but as a legacy.

Subject to a single reservation, we are of the view that the excess should be treated as a special legacy, to be paid in priority to other legacies. Legatees are mere volunteers, while the estate trustee is entrusted with an important responsibility.

Our sole reservation concerns dependants under Part V of the *Succession Law Reform Act*. Under section 68(1) of the Act, the burden of any provision for support ordered in favour of a dependant falls rateably upon that part of the estate to which the jurisdiction of the court extends, unless the court orders otherwise.[372] If the compensation in excess of the statutory jurisdiction were to be a legacy with priority over other legacies, the scheme established in section 68(1) would seem to be undermined, for the burden would no longer be borne rateably. We are of the view that this portion of the compensation, like other legacies, should contribute to support rateably, unless the court otherwise orders.

We therefore recommend that, where there is a provision in the will fixing the compensation of the estate trustee named therein and there is a deficiency of assets, the estate trustee's compensation should be deemed to be an administrative expense and have priority over legacies and other unsecured debts,[373] to the extent that it does not exceed what would be allowed as fair and reasonable compensation under the court's statutory jurisdiction, and that any excess over that amount should be treated as a legacy, and subject to the order of application of assets. Subject to section 68 of the *Succession Law Reform Act*, the excess should be paid in priority to other legacies.

(f) Compensation of the Public Trustee

In the course of considering the issue of compensation generally, we examined the basic legislative framework governing the compensation of the Public Trustee. The Public Trustee has various responsibilities under several

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[372] Section 68(2) provides that "[t]he court may order that the provision for support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to the court seems proper".

[373] For a discussion of priorities in the case of insolvent estates, see *infra*, ch. 4, sec. 2(c).

statutes,[374] including the *Crown Administration of Estates Act*,[375] which authorizes the Public Trustee to apply for letters of administration in certain circumstances.[376]

The *Public Trustee Act*[377] addresses the issue of compensation in the following terms:

> 8.—(1) The Public Trustee shall make the charges prescribed by the regulations made under this Act for his services against every estate that comes to his hand to be dealt with.
>
> (2) All fees, charges, and expenses that would be allowed to a private trustee shall be allowed to the Public Trustee and shall be collected and accounted for in the manner prescribed by the regulations made under this Act.
>
> (3) Notwithstanding this or any other Act, the Public Trustee may in connection with any estate or trust administered or managed by him make a reasonable charge for any service performed by a member of the staff of his office where the service is one for which a charge would be allowed as a disbursement against the estate or trust if performed by a person retained, engaged or employed to perform such service by a private trustee, and every such charge shall for the purpose of such estate or trust be deemed to be a disbursement.

Section 13 of the *Crown Administration of Estates Act* addresses compensation specifically in relation to the administration of estates. It provides as follows:

> 13. The Public Trustee may deduct from the money received on account of an estate all disbursements made by him in respect of inquiries that he made before taking out letters of administration, as well as disbursements otherwise made by him in respect of the estate, and a commission for his services not exceeding 5 per cent of all moneys received by him as administrator.

In 1986, a surrogate court judge held that the commission claimed by the Public Trustee was subject to review by a court in the exercise of its jurisdiction under section 61(3) of the *Trustee Act* to ensure that the amount of compensation is "a fair and reasonable allowance".[378] In this case, the court reduced the commission from five to four per cent.

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374 See, for example, *Charities Accounting Act*, R.S.O. 1980, c. 65; *Escheats Act*, R.S.O. 1980, c. 142; and *Mental Hospitals Act*, R.S.O. 1980, c. 263.

375 R.S.O. 1980, c. 105.

376 Section 2 provides that the Public Trustee may apply for letters of administration "[w]here a person dies in Ontario intestate without leaving any known next of kin living in Ontario or where the only next of kin are minors and there is no near relative in Ontario willing and competent to apply for a grant of administration or to nominate some person to apply for such a grant".

377 R.S.O. 1980, c. 422.

378 *Re Brimicombe Estate* (1986), 22 E.T.R. 1 (Ont. Surr. Ct.).

We are of the view that, where he is acting as an estate trustee, the Public Trustee should be compensated according to the standards governing other estate trustees. While the present law allows his commission to be reduced, having regard to the "fair and reasonable" standard, it does not permit it to exceed the five per cent maximum in the *Crown Administration of Estates Act*. We consider that this is an arbitrary limit because there may be estates that are so difficult and complicated that the commission that may be realized will be wholly inadequate. We therefore recommend that the Public Trustee should be compensated for acting as an estate trustee on the same basis as private estate trustees, and that the five per cent maximum set out in section 13 of the *Crown Administration of Estates Act* should be abolished.

(g) Reimbursement of Expenses

Like a trustee, a personal representative may reimburse himself out of the assets of the estate for all expenses that he has properly incurred in the course of discharging his responsibilities. This right exists independently of statute,[379] and has been partially codified by section 33 of the *Trustee Act*, which provides, in part, that a trustee "may reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust or powers". In the Trusts Report, we took the view that the power of reimbursement was a necessary administrative power that should be included in our proposed statutory list. We recommended that the revised *Trustee Act* should contain a provision to the effect that trustees may reimburse themselves or pay or discharge out of trust property all expenses incurred in or about the administration of the trust.[380]

We are of the view that estate trustees should enjoy this power as well, and we so recommend.

Where there is more than one estate trustee, we believe that entitlement to reimbursement should depend on subsequent approval of the act in question by the estate trustees where they have not been party to that act. Earlier, we recommended that, like ordinary trustees, estate trustees should be required to act unanimously in order to bind the estate. If reimbursement were available to an estate trustee whose act has not been approved by all the other estate trustees, this principle would be circumvented, insofar as the act, by definition, would have been unauthorized. Accordingly, we recommend that, if one or more of several estate trustees enter into a contract or exercise an authority or power without the concurrence of the other estate trustees, such one or more estate trustees should not be entitled to reimbursement from estate assets for sums expended unless the act is subsequently ratified by all the estate trustees.

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[379] Williams, Mortimer and Sunnucks, *supra*, note 75, at 705.

[380] Trusts Report, *supra*, note 3, at 248, and Draft Trustee Bill, s. 35(p).

6. SUSPENSION AND TERMINATION OF THE OFFICE

(a) Introduction

In the normal situation, estate trustees will discharge their various duties and will wish, upon their completion, to end their responsibility formally. Under the present law, personal representatives usually circulate accounts and obtain releases from all the beneficiaries who are legally competent, or pass their accounts with the Ontario Court (General Division).

However, in extraordinary circumstances, prior to the completion of his duties, the responsibility of a personal representative may cease, either temporarily, by suspension, or permanently, as a consequence of death, retirement, or removal from office. We have already discussed transmission of the office when one of these latter events occurs.[381]

In this section, we shall not examine the termination of office in the normal situation. This matter will be addressed in some detail in chapter 6, where we discuss the approval or "passing" of accounts.[382] We shall confine our discussion to the rare situation where the performance of the office of estate trustee is interrupted or terminated.

(b) Suspension of the Office

Under the present law, a personal representative in effect may be suspended following the grant of letters probate or letters of administration only in the case of incapacity.[383] In such a case, it was the practice of the ecclesiastical courts, where an executor or administrator "became of unsound mind . . . to grant administration for his use and benefit until he should become of sound mind".[384] This grant was known as *administration durante coporis aut animi vitio*. The following passage describes the practice in Ontario:[385]

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381 *Supra*, this ch., sec. 2(c).

382 *Infra*, ch. 6, sec. 2(d).

383 There are other examples of grants of administration where the office of personal representative is temporarily assumed by a person not otherwise entitled thereto: see, generally, Hull and Cullity, *supra*, note 1, at 271-77. However, in our view, these do not constitute suspension of the office because the office has not been previously granted to the person entitled. Such is the case, for example, where administration is granted to a person during the absence from Ontario of the next-of-kin entitled to administration (*Estates Act*, *supra*, note 35, s. 39) or where administration is granted to a person because the sole executor or the person entitled to letters of administration is a minor (*ibid.*, s. 51(1)).

384 Hull and Cullity, *supra*, note 1, at 277.

385 *Ibid.*, at 278-79 (footnotes deleted). The practice is very similar in England: see Williams, Mortimer and Sunnucks, *supra*, note 75, at 337.

> When a sole executor or administrator becomes incapacitated through mental or physical illness the grant to him can be impounded[386] and administration granted to his committee, if any, or to some other person interested in the estate.
>
> When several executors have proved the will, and one becomes incapable of acting, the Court, on the application of the others, will revoke the grant and make a new grant of probate to the applicants, reserving power to the incapacitated executor to join in the probate if and when he recovers. Similarly, when a grant has been made to two or more administrators and one becomes incapacitated the Court on the application of the others will revoke the grant and make a new grant to the applicants.

We do not consider it necessary or desirable to continue the existing rules respecting suspension of the office of personal representative. Continuing to allow courts the power to suspend the office of estate trustee would distinguish the office from ordinary trustees. Under the present law there is no jurisdiction in the court to suspend a trustee, and we did not recommend that such a power be conferred in the *Report on the Law of Trusts*. The problem of supervening incapacity, to which the power of suspension responds, can be addressed effectively by other means. Pursuant to recommendations that we shall shortly discuss, the estate trustee may retire or be removed.[387] In light of these considerations, we recommend that the concept of the suspension of the office of estate trustee should be abolished and that, in the case of incapacity, the estate trustee should be subject to the same rules as an ordinary trustee.

(c) Termination of the Office

(i) Retirement

In Ontario, a personal representative cannot retire from office in the absence of an order of the court.[388] There are two sources of jurisdiction for courts to sanction retirement. Courts have an inherent jurisdiction to revoke the grant to a personal representative, and may do so on the basis that the

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386 Where a grant is "impounded", it is not revoked, but kept in the court office until the recovery of the person who has become incapacitated. Where, in the case of a sole incapacitated personal representative, the grant of administration *durante corporis aut animi vitio* is made to a committee, the original grant is not impounded: see *Re Cooke*, [1895] P. 68.

387 Another alternative is for the court to use its equitable jurisdiction to appoint a receiver appointed and to grant injunction to restrain the estate trustee from intermeddling with the estate.

388 By virtue of s. 2(1) of the *Trustee Act*, *supra*, note 32, a trustee may retire without a court order. Section 2(2) states that the section does not apply to executors or administrators. Section 3(1) of the *Trustee Act* provides that a trustee who desires to be discharged from any of the trusts or powers conferred on her may be replaced by another trustee: see discussion, *infra*, this ch., sec. 6(c)(ii).

grantee wishes to be relieved of his duties.[389] It seems that courts will exercise this power only in "special circumstances"[390] and it is unclear whether this jurisdiction will ever be exercised to relieve an executor, as distinct from an administrator, from his duties.[391]

Courts also have a statutory jurisdiction to allow a personal representative to leave her office. Section 37(3) of the *Trustee Act* provides that an order for the removal of a personal representative may be made "upon the application of any executor or administrator desiring to be relieved from the duties of the office". It may be expected that the courts would be loath to permit the retirement of executors, particularly where minors or other incapacitated individuals are involved. While the cases bearing on this matter concern trustees, rather than executors, the approach taken to trustees by the courts would seem to be applicable to both offices. In restricting retirement, courts emphasize the fact that the trustee has been selected by the deceased, and where corporate or professional trustees have been appointed, courts tend to underline the confidence placed in them by the deceased respecting their continuity, impartiality and competence.[392]

When we considered this issue in the Trusts Report, we took the view that section 2 of the present *Trustee Act*, which governs retirement by trustees was generally satisfactory, but was in need of minor improvements.[393] To deal with this matter, the following statutory provision was proposed:

> 25.—(1) Where a trustee declares in writing that he desires to be discharged from the trust or a part of the trust and if after his discharge there will be either a trust company or two or more individuals to act as trustees in his place, then, if his co-trustees and such other person, if any, as is empowered to appoint trustees, consent by deed to his discharge and to the vesting of the trust property in his co-trustees alone, he shall be deemed to have retired from the trust and is discharged therefrom without any new trustee being appointed in his place.
>
> (2) A trust instrument must not withhold from a trustee the right to retire from the trust or a part of the trust and must not make the requirements for retirement more onerous than are provided in subsection (1), and any such provisions are invalid for all purposes.

It should be noted that this provision does not allow non-judicial retirement where only one individual trustee would remain in office. In our

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389 Williams, Mortimer and Sunnucks, *supra*, note 75, at 337.

390 *Ibid.*

391 While no distinction is drawn between administrators and executors in Williams, Mortimer and Sunnucks, *supra*, note 75, at 337, *n.* 43, the cases cited in support of the proposition that grants may be revoked "occasionally" concern only administrators.

392 *Re Thomas*, unreported (June 11, 1980, Ont. H.C.J.), and *Re Heintzman* (1981), 31 O.R. (2d) 724 (H.C.J.).

393 Trusts Report, *supra*, note 3, at 88-92.

view, the consent of the court should be sought for the continuation of an individual as the only trustee in these circumstances. Under the revised *Trustee Act*, this could be accomplished pursuant to the broad judicial power to remove a trustee, which contains no statutory limitation with respect to the minimum number of remaining trustees.[394]

The policy underlying the case law applying to trustees and the recommendations in the Trusts Report is simply that no one should be compelled to continue as a trustee if she desires to retire. It may be contended that the position of an estate trustee differs from that of an ordinary trustee, insofar as the administration of an estate is a finite responsibility, often of a short duration, while a trust continues for an indefinite duration. Yet, the administration of an estate may continue for a considerable period of time and, in such circumstances, it may be appropriate for an estate trustee to retire. Extending the recommendations in the Trusts Report to estate trustees would not unduly impede the efficient administration of estates. These recommendations are designed to avoid disruption of the ongoing trust: following the retirement, there must be either a trust company or two other individuals remaining in office, and retirement requires the consent of the remaining trustees or any other person empowered to appoint trustees.

In order to ensure the equitable and efficient administration of the estate upon the retirement of an estate trustee, it would appear necessary to institute a procedure whereby persons interested in the estate could be apprised of this change. Accordingly, we recommend that the provisions for the retirement of trustees under the revised *Trustee Act* should apply to estate trustees, provided that such retirement should not be effective until after registration of a notice of retirement in a form prescribed by regulation and surrender of the estate trustee certificate in the office of the Ontario Court (General Division) from which the estate trustee certificate was issued to the retiring estate trustee. Surrender of the estate trustee certificate should be solely for the purpose of revoking the designation of the estate trustee.

(ii) Removal

In the *Report on the Law of Trusts*, we discussed both judicial removal of trustees and non-judicial removal of trustees,[395] and we propose to consider the position of estate trustees from both of these perspectives.

We turn first to judicial removal. Since 1890,[396] the court has had a statutory power to remove a personal representative. At present, this jurisdiction is incorporated in section 37 of the *Trustee Act*. The basic effect

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[394] *Ibid.*, at 118, and Draft Trustee Bill, s. 56.

[395] *Ibid*, at 92-113.

[396] *The Law Courts Act, 1890*, 59 Vict., c. 18, s. 4.

of this provision is to give the courts the same power to remove personal representatives that they possess with respect to trustees pursuant to their inherent and statutory jurisdiction.[397] Section 37(1) provides that a personal representative may be removed by the court "upon any ground upon which the court may remove any other trustee". The general guidelines governing the removal and replacement of both trustees and personal representatives have remained constant for over a century,[398] and have been applied in a variety of circumstances, which are too numerous to enumerate.[399]

Non-judicial replacement or removal of a trustee may be effected pursuant to section 3 of the *Trustee Act*, which provides as follows:

> 3.—(1) Where a trustee dies or remains out of Ontario for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or has been convicted of an indictable offence or is bankrupt or insolvent, the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing appoint another person or other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing or being unfit or incapable.
>
> (2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or where there were two or more trustees, of the last surviving or continuing trustee, are or is capable of exercising or performing any power or trust that was given to or capable of being exercised by the sole or last surviving trustee.

For our purposes, it is important to note that the removal of a trustee under section 3(1) can be accomplished only by the appointment of a replacement trustee. At present, there is no statutory authority, either in the *Trustee Act* or elsewhere, that authorizes the non-judicial removal of a trustee without a substitute trustee being appointed in his place. We examined this provision in considerable detail in the Trusts Report,[400] and we do not propose to recapitulate that lengthy discussion.

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[397] Under s. 5 of the *Trustee Act*, *supra*, note 32, the court may remove a trustee only where it appoints a substitute trustee. It has been held that s. 5 does not apply to personal representatives: see *Re Weil*, [1961] O.R. 751, 29 D.L.R. (2d) 308, rev'd [1961] O.R. 888, 30 D.L.R. (2d) 91 (C.A.).

[398] See *Letterstedt v. Broers* (1884), 9 A.C. 371, at 385-87, and [1881-85] All E.R. Rep. 882, at 886-87, for the classic statement. For a discussion, see Waters, *supra*, note 43, at 682-87.

[399] See, generally, Hull, "Removal of Trustees and Personal Representatives" (1982), 6 E.T.Q. 54, at 59-60.

[400] Trusts Report, *supra*, note 3, at 92-112.

Whether section 3 applies to personal representatives is unclear. The legislative history is equivocal and, while the leading commentators have not addressed the question directly, it would appear that their views are inconsistent.[401] However, there is a 1982 Ontario decision stating that "executors may only be removed from their office by the court pursuant to s. 37",[402] which suggests that section 3 does not apply to personal representatives.

In the *Report on the Law of Trusts*, the Commission recommended the enactment of several detailed statutory provisions respecting the non-judicial removal of ordinary trustees.[403] These are too lengthy and complex to be reviewed in this report. However, it is important to note that the proposed *Trustee Act* continues the non-judicial power of removal by appointment of substitute trustees—albeit in a substantially amended and improved form—and, in addition, creates a new power of non-judicial removal that is exercisable without the appointment of a substitute trustee.[404]

Our recommendations respecting the non-judicial removal of trustees followed from our basic concern that the ongoing management of the trust not be unnecessarily disrupted in circumstances where the removal of a trustee is required. We took the view that judicial intervention in this area, inevitably involving time and expense to the trust, should be discouraged, and that non-judicial discharge of trustees should be encouraged. Consequently, it was essential to make the mechanism for non-judicial removal relatively simple and, where substitute trustees are to be appointed, provide for the same assurances as to the validity of the appointment and the vesting of trust property that are given by a court order. It was to these ends that our proposals were directed.[405]

With respect to judicial removal, in the Trusts Reports we recommended the continuation of the existing power subject, however, to amendment in several respects. Since we took the view that resort should be had to the judicial power only in exceptional circumstances, we recommended that judicial removal should be possible only where it appears to the court to be in the best interests of a trust and where it would be inexpedient, difficult or impracticable without the assistance of the court. We proposed that courts should be empowered to remove a trustee without appointing a

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401 Widdifield, *supra*, note 102, at 415-16, assumes that s. 3 applies to personal representatives, while Waters, *supra*, note 43, at 37, *n.* 21 assumes that it does not. Neither, however, discusses the issue.

402 *Re McLean*, *supra*, note 47, at 171.

403 Trusts Report, *supra*, note 3, at 92-117, and Draft Trustee Bill, ss. 19-25. The Commission also recommended that there should be a non-judicial power to appoint additional trustees, which may be exercisable where no replacement is sought: *ibid.*, at 115-17, and draft Trustee Bill, s. 21.

404 *Ibid.*, at 112-13 and Draft Trustee Bill, s. 25(3).

405 *Ibid.*, at 85-86.

substitute trustee. This power would complement the non-judicial power of removal without the appointment of a substitute trustee.[406]

We believe that the policy considerations underlying the recommendations that we made with respect to removal of trustees apply to personal representatives. There can be little doubt that it is equally important to ensure that, where the removal of estate trustees is warranted, it should be conducted in a manner that does not disrupt the efficient and orderly administration of the estate. We can discern no principled basis on which to distinguish trustees from estate trustees. Consequently, we recommend that the provisions of the proposed *Trustee Act* governing the non-judicial and judicial removal of trustees should apply to estate trustees.

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[406] *Ibid.*, at 117-20, and Draft Trustee Bill, s. 56(1).

CHAPTER 3

THE BENEFICIARY

1. INTRODUCTION

In this chapter, we shift our focus from estate trustees to beneficiaries. The discussion will be confined to certain discrete problems in the present law, and thus will examine only a very small part of the massive body of law concerning estate beneficiaries. The chapter is divided into two parts. In the first, we consider the identification of beneficiaries, and discuss the rules governing survivorship, missing beneficiaries and the presumption of death, and beneficiaries whose existence must be ascertained.

In the second part, we discuss certain rules respecting bequests and devises. It comprehends the following topics: legacies to persons who have received *inter vivos* gifts from the deceased; legacies that are promised to a person in return for services or work done for the deceased while the latter was alive; conditions not to contest a will; the killing of a testator or intestate by a beneficiary or heir; and the doctrine of lapse.

2. IDENTIFICATION OF BENEFICIARIES: DEAD, MISSING, AND UNASCERTAINED BENEFICIARIES

The distribution of an estate in accordance with the will or the law governing intestacy depends on finding the persons entitled to share in the estate. In most cases, this will not pose a problem. Where, for example, the will identifies the beneficiaries by name and they are immediately available, it will be a simple task. In other circumstances, however, identifying beneficiaries will be considerably more difficult. In this section, we shall consider three such situations.

First, since succession to the property of a deceased depends upon a beneficiary surviving the deceased, a problem arises where the testator or intestate and the possible beneficiary are both dead, and it is unclear who has died first.

The second situation is where a beneficiary, whose existence was once known, is missing and there is no direct proof that she has died, so that the existence of the beneficiary at the time of the death of the testator or intestate is uncertain.

The third situation is where the estate is to be distributed to a class of persons, and the personal representative must ascertain whether that class does in fact exist, and, if so, who are its members.

(a) Survivorship

Questions of survivorship may arise either where two or more persons die in a common disaster or where they die of independent causes in circumstances where the order of death cannot be determined. The common law addressed only the first situation.

At common law, persons who died in a common disaster were known as "commorientes". The issue of survivorship among commorientes was dealt with by the general procedural rule that claimants must prove the facts necessary to establish their claims. If no beneficiary could establish the order of death in support of the claim, the property of the deceased would be awarded to his next-of-kin. Depending on the particular circumstances, the common law could lead to unsatisfactory results: the failure of a claimant to prove that the deaths had occurred in a certain order could lead to the property of a testator being distributed in a manner that she would certainly have opposed.[1]

Until 1977, in Ontario the inadequacy of the common law was addressed by *The Survivorship Act*,[2] which created a statutory presumption that, where two persons die at the same time or in circumstances rendering it uncertain which of them survived the other, the deaths occurred in the order of

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[1] This can be illustrated by the following example:

> T by will leaves his entire estate to X, but, if X should predecease him, to Y. T and X die in a common accident. A is the beneficiary of X's estate. Z is T's next of kin who would inherit T's estate on intestacy.

In this case, assuming that the order of T's and X's deaths cannot be established, A (who claims through X) will be unable to prove that X survived T, and will therefore not be entitled to inherit. Y has a similar problem, since his claim depends upon X having predeceased T, a fact that Y will be unable to prove. The common law would award the property to T's next of kin, Z. At common law, the next of kin of a deceased person had the *prima facie* right to inherit his property, which prevailed unless the beneficiary of a valid will or someone claiming through him could affirmatively prove that he had a better right. Neither A nor Y can provide the affirmative proof needed to displace the rights of the next of kin.

See Hull and Cullity, *Macdonell, Sheard and Hull on Probate Practice* (3d ed., 1981), at 180-81.

[2] R.S.O. 1970, c. 454. This statute was originally enacted as *The Commorientes Act, 1940*, S.O. 1940, c. 4, and was based on the English *Law of Property Act 1925*, 15 & 16 Geo. 5, c. 20, s. 184 (U.K.). It was repealed in 1977 by *The Succession Law Reform Act, 1977*, S.O. 1977, c. 40, s. 62(1). For a general discussion of the historical background, see Feeney, *The Canadian Law of Wills* (3d ed., 1987), Vol. 2, at 356-57.

seniority; and, hence, the younger was deemed to have survived the older.[3] The Act provided that there was an exception to this rule where the will contained provisions for the disposition of property in case the beneficiary did not survive the testator or died at the same time or in circumstances where the order of death was uncertain; the disposition in the will would take effect as if the beneficiary had not survived the testator or died at the same time or in circumstances in which it was uncertain who survived.[4] The seniority rule was also subject to certain provisions of *The Insurance Act*, which stipulated that, subject to a contract or declaration otherwise, where the beneficiary of a life insurance policy and the person whose life was insured died at the same time or in circumstances rendering it uncertain which of them survived the other, the insurance money was to be paid as if the beneficiary had predeceased the person whose life was insured.[5]

While the seniority rule was clear and easy to administer, it was arbitrary and could produce capricious, if not harsh, results. The rule would disinherit the living relatives or beneficiaries of the more senior of the commorientes, and involved the complexity of double succession.[6] In 1977, the seniority rule was replaced by the rules that now appear as section 55 of the *Succession Law Reform Act*,[7] which provides as follows:

> 55.—(1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.

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[3] *The Survivorship Act*, *supra*, note 2, s. 1(1).

[4] *Ibid.*, s. 1(3).

[5] *Ibid.*, s. 1(2), as en. by S.O. 1972, c. 43, s. 1, referring to *The Insurance Act*, R.S.O. 1970, c. 224, ss. 190 and 268 (see, now, *Insurance Act*, R.S.O. 1980, c. 218, ss. 192 and 272.) For a discussion of the relationship between these provisions and *The Survivorship Act*, see Hull and Cullity, *supra*, note 1, at 184, and the cases cited in *n.* 59.

[6] This is illustrated by the following example:

> H and W, husband and wife, both die intestate in a common accident. The survivor would be entitled to inherit the other's estate. They have no children, but H's sister S survives him and W's mother M survives her.
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> In this example, whichever spouse is younger is deemed to have survived the other, and would therefore inherit the other's property. If H were younger than W, then H would be deemed to have inherited all W's property; W's property (as well as H's property) would therefore pass to H's sister, even though W's mother is living. If W were younger than H, then H's property would pass through W's estate to his mother-in-law, even though H's sister is living. These results are obviously unsatisfactory. The property of the older spouse is subject to two successions, which is unnecessarily complicated. More importantly, the property of the older spouse goes to the family of the younger spouse, instead of remaining in the family of the former. In this example, the likelihood is that H would have preferred his estate to pass to his sister S, and W would have preferred her estate to pass to her mother M.

[7] *The Succession Law Reform Act, 1977*, supra, note 2, ss. 61-63. See, now, *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 55.

(2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die at the same time or in circumstances rendering it uncertain which of them survived the other or others, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.

(3) Where a will contains a provision for a substitute personal representative operative if an executor designated in the will,

(a) dies before the testator;

(b) dies at the same time as the testator; or

(c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated executor dies at the same time as the testator or in circumstances rendering it uncertain which of them survived the other, then, for the purpose of probate, the case for which the will provides shall be deemed to have occurred.

(4) The proceeds of a policy of insurance shall be paid in accordance with sections 192 and 272 of the *Insurance Act* and thereafter this Part applies to their disposition.

It should be emphasized that, unlike the common law, which applied only to persons who died in a common disaster, the present survivorship rules apply as well to cases where two or more persons die of independent causes at approximately the same time:[8] the rules apply where persons die "at the same time or in circumstances rendering it uncertain which of them survived the other or others".

By providing that, where there is a question of survivorship, the property of each person is to be disposed of as if she were the survivor, section 55(1) responds to the major infirmity of the seniority rule – disinheriting the living next-of-kin or beneficiaries of the more senior person. Nevertheless, we consider the present rules to be unsatisfactory. Where, for example, a husband and wife die intestate in a car accident within a very short time period, but where the evidence establishes that the wife died immediately after her husband, section 55(1) will be inapplicable. Persons claiming through the wife will be able to establish the sequence of death; this will result in the wife inheriting the husband's property, which, in turn, will subsequently pass through her estate to the beneficiaries of her estate. Thus, the brief period of actual survivorship will produce two quick successions. Where both spouses have wills, this problem may be avoided by providing that a

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[8] *Hickman v. Peacey*, [1945] A.C. 304, at 314-15, [1945] 2 All E.R. 215 (H.L.) (*per* Viscount Simon L.C.), and *Re Lay Estates* (1961), 32 D.L.R. (2d) 156, 36 W.W.R. 414 (Man. Q.B.).

beneficiary must survive a certain number of days as a condition of taking a bequest or devise.

In our view, the problem of double succession would best be met if section 55(1) were amended to follow the example of well-drafted wills, which require a certain period of survival as a condition of inheritance. We believe that a survival requirement of seven days is appropriate. This period is preferable to that of fifteen days or thirty days, either of which often appears in wills drafted by solicitors; since the effect of a survival requirement is to place succession and the title of the estate trustee in doubt for the prescribed period, we are loath to legislate uncertainty for more than a week.

We are also of the view that it should be made clear that the general rule is applicable where two deaths occur independently of each other, and it cannot be established that they occurred within seven days of each other. Such a situation can arise where the date of death of either or both of the two decedents is not known even approximately. Retaining the words "in circumstances rendering it uncertain which of them survived the other or others" will meet this situation. We believe, however, that the words "at the same time" should be deleted from section 55(1), since the institution of the seven day survival period would render them redundant.

Finally, we are of the view that the intention of the testator, as expressed in her will, should prevail over the rules that we have proposed. This will allow testators to provide for different periods of survival as they see fit.

In order to effect these changes, we recommend that section 55(1) of the *Succession Law Reform Act* should be amended to read as follows:

> 55.—(1) Unless otherwise provided by will, where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, or within seven days of each other, the property of each person, or any property of which he is competent to dispose, shall be disposed of as if he had survived the other or others.

Section 55(1) is the primary rule pertaining to survivorship. Subsections (2) and (3) also deal with survivorship. The former concerns persons holding title to property as joint tenants; it also deals with joint accounts. Subsection (3) relates to the appointment of a substitute personal representative. We suggest that the reasons in favour of a seven day survival requirement in section 55(1) and the deletion of the phrase "at the same time" also apply to these provisions. We therefore recommend that section 55(2) should be amended to apply where all the joint tenants "die in circumstances rendering it uncertain which of them survived the other, or others, or within seven days of each other". The closing flush of section 55(3) should be amended to apply when "the designated estate trustee and the testator die in circumstances rendering it uncertain which of them survived the other, or within seven days of each other".

(b) Missing Beneficiaries — Proof of Death

In this section, we examine problems caused when a beneficiary, whose existence was once known, is missing. Uncertainty about the whereabouts of a beneficiary may raise the question whether she was alive at the death of the testator or intestate, or at the time of any judicial determination concerning her interest in the estate. In such cases, a court may be called upon to declare a person to be presumed dead. A declaration of death will affect the disposition of property to which the person would otherwise have been entitled under the will or according to the law governing intestacy.

In the discussion that follows, we shall review the present substantive and procedural law bearing upon this matter and the approach that has been proposed by the Uniform Law Conference of Canada. We shall then conclude with our recommendations for reform.

It should be emphasized that, although we are examining the matter of missing persons by focussing on beneficiaries, the principles and procedures that we shall discuss below are not so confined in their application. They apply generally, and thus address the situation where the testator or intestate has been missing, and a question arises whether that person is alive.

(i) Substantive Rules Respecting Declaration of Death

In most cases, the question whether a person has died does not arise; nor do questions usually arise concerning the date of death. However, difficulties do emerge where a person disappears, and there is no direct proof that she has died.

Courts may make a declaration of death by either of two means.[9] First, a court may make such a declaration by drawing from the facts proven the inference that the person in question has died. Second, a court may make a declaration of death where the proof of certain facts gives rise to a presumption of law that the person has died. After we explain finding a death by inference, we will focus on the presumption of death because that is the area in which reform is needed.

In certain cases, the circumstances surrounding the disappearance of a person will justify the court making an immediate declaration of death without the necessity of waiting a specified number of years between the disappearance and the declaration. For a court to make such a declaration, the circumstances of the disappearance would have to be such that a court could infer that the death of the absentee was the probable explanation.[10] While it will normally have to be shown that the absentee disappeared in

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[9] See, generally, Shepherd, "Presumption of Death in Ontario" (1977-78), 4 E.T.Q. 326.

[10] See, for example, *Re Kreutweiser and Taylor*, [1946] O.W.N. 184 (Surr. Ct.).

the face of a "specific peril", such as a storm at sea, there have been cases in which death has been inferred by a court in less dramatic circumstances.[11]

Where, however, a person disappears in circumstances that do not suggest death, there is no basis upon which a court can draw an inference that she has died, and consequently, it cannot make an immediate declaration. At common law, even where persons who might be expected to have contact with the absentee have not received any word of her, such an inference could not be drawn on the basis of the evidence, although it may be reasonable to do so after a certain period of time has elapsed. In such a case, the common law requires a period of disappearance, during which there has to be no indication of the existence of, or communication from, the missing person. Upon the satisfaction of this requirement, the person wishing to prove the death of the absentee is assisted by a presumption that the absentee is dead.

The common law presumption of death arises where the following two conditions are met: (1) a person has been absent without explanation for not less than seven years; and (2) fruitless inquiries have been made for her among the persons who might have been expected to see or hear from her and in the places where she might have been expected to be found.[12] The first condition requires an absence without explanation. A departure for a perfectly good reason, such as to relocate in a different country or town, will not begin the seven-year period,[13] although a further lapse of time after which the absentee cannot be traced, even in the absence of a specific event, will start the period running.[14] The second condition involves direct inquiries of individuals, such as relatives, friends, or business associates, with whom the absentee might have communicated, and general inquiries, usually by advertisements in newspapers, in the places where the absentee was last known to be or was likely to be. The extent of the investigation depends upon the circumstances of the individual case.[15]

The presumption of death is not conclusive; it may be rebutted by credible evidence that suggests that the absentee is still alive, or that there is a good reason for her to keep her whereabouts secret. In the absence of such evidence, a declaration of death will be made.

The common law presumption merely establishes the fact of death, and does not imply that it occurred at any particular time. Moreover, at common

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[11] Shepherd, *supra*, note 9, at 333-35, and Hull and Cullity, *supra*, note 1, at 176-78.

[12] See, generally, Hull and Cullity, *supra*, note 1, at 178-80, and Shepherd, *supra*, note 9, at 337-41.

[13] *Re Duncan* (1914), 7 O.W.N. 539 (H.C. Div.).

[14] *Olsson v. Ancient Order of United Workmen* (1916), 38 O.L.R. 268 (H.C. Div.).

[15] The circumstances include not only the facts known about the absentee's departure and her destination, but also include the amount of money at stake. A small bequest will not justify as extensive a search as a large bequest: see Shepherd, *supra*, note 9, at 338-39.

law, the court has no power to fix the date of death of a person who has been declared dead by virtue of the presumption. Thus, a finding that an absent beneficiary or next-of-kin is presumed dead will not by itself resolve questions of succession, which depend upon establishing not only the fact of death, but also the sequence of deaths.

The return of a person who has been declared to be presumed dead will obviously raise various legal difficulties. Where the person is a beneficiary whose share of an estate has been distributed to another, questions arise respecting the liability of the personal representative and the remedies available to the beneficiary.

Unless the personal representative has first obtained a court order declaring the beneficiary to be presumed dead,[16] she is liable for *devastavit*,[17] and will be personally liable to the returning beneficiary for the value of the property that she would have inherited.

The returning beneficiary also has remedies against the person who has received her share. Irrespective of whether there is a court order of presumed death, a recipient, who will not have given value for the property, does not acquire a title to the property that is good against the beneficiary, who is the true owner. The beneficiary will have the right to recover the property to the extent that it has been retained in an identifiable form.[18] In addition, the beneficiary will have a right to recover the value of the property by an action against the recipient personally, whether or not the property remains in an identifiable form.

(ii) Procedural Issues

Ontario courts have jurisdiction to make a declaration of death only in proceedings in which they are properly exercising some other authority. At common law, courts do not have power to make a declaration of death for all purposes, and courts cannot make a declaration of death in proceedings that have been brought exclusively for that purpose.[19] Courts have declined to assume such power due to their reluctance to issue an order *in rem*, which may affect the rights of persons who are not parties to the proceedings in

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[16] Under s. 60(2) of the *Trustee Act*, R.S.O. 1980, c. 512, a personal representative who is acting upon the opinion, advice or direction of the court shall be deemed to have discharged his duty as personal representative, unless he has been guilty of some fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

[17] *Supra*, ch. 2, sec. 4(a)(ii)b.

[18] For a discussion of the remedies available to beneficiaries, see Sunnucks, Martyn, and Garnett, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (1982) (hereinafter referred to as "Williams, Mortimer and Sunnucks"), at 973-77.

[19] *Re Sell* (1924), 26 O.W.N. 462, [1924] 4 D.L.R. 1115 (H.C. Div.), and *Re Hum Fong Shee*, [1967] 1 O.R. 220 (C.A.).

which the declaration is sought.[20] Where, however, a finding of death is necessary to the exercise of another jurisdiction, courts may make a declaration of death.[21]

Faced with the possibility that a beneficiary has died before the death of the deceased, it would appear that a personal representative may choose between bringing an application or making a payment into court.

There has been a difference of opinion in Ontario courts as to what type of application should be brought in these circumstances. Under the *Trustee Act*,[22] "[a] personal representative may . . . apply to the Supreme Court for the opinion, advice or direction of the court on any question respecting the management or administration of . . . the assets of . . . his testator or intestate". Rule 14.05(3)(a) of the rules of court provides that an application may be brought "on a question affecting the rights of a person in respect of the administration of the estate of a deceased person", which would appear to comprehend an application for a declaration that an absent beneficiary or next-of-kin is dead.[23] A judge may direct a reference to inquire into and report on the beneficiaries or next-of-kin of the deceased. On a reference, the referee may take such evidence and direct such advertisements as may be deemed advisable to determine whether they have survived the deceased.[24] The report of the referee may have to be reviewed and confirmed by the judge.

While effective in achieving the ultimate result, the procedure under rule 14.05(3) is unduly cumbersome, for it may involve three court appearances—before the judge initially, then the referee, and finally the judge

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[20] *Re Hum Fong Shee*, *ibid.*, at 225-26.

[21] See, for example, *Darling v. Sun Life Assurance Co. of Canada*, [1943] O.R. 26, [1943] 1 D.L.R. 316 (C.A.) (determination whether life insurance proceeds are payable), and *Homanuke v. Homanuke* (1920), 13 Sask L.R. 186, [1920] 1 W.W.R. 673 (K.B.) (determination whether second marriage is valid), aff'd without reference to this point (1920), 13 Sask. L.R. 557, [1920] 3 W.W.R. 749 (C.A.).

[22] *Trustee Act*, *supra*, note 16, s. 60(1).

[23] O. Reg. 560/84, as am. by O. Reg. 711/89, s. 15. Formerly, the rules of court were known as the "Rules of Civil Procedure". This was changed in 1989: *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 160a, as en. by S.O. 1989, c. 55, s. 31.

Under r. 607 of the former Rules of Practice and Procedure of the Supreme Court of Ontario, R.R.O. 1980, Reg. 540 (hereinafter referred to as "Rules of Practice"), it was more clear that this question could be brought before the courts, as specific reference was made to "[t]he ascertainment of any class of creditors, legatees, devisees, next of kin or others".

[24] For a discussion of the practice under r. 607 of the former Rules of Practice, *supra*, note 23, see Archibald, "Estate Administration After the Repeal of the Succession Duty Act", in *Special Lectures of the Law Society of Upper Canada 1980* [:] *Recent Developments in Estate Planning and Administration* (1980) 63, at 75-76. The practice has followed or approved in several cases: see, for example, *Re Bell*, [1946] O.R. 854 (H.C.J.), aff'd [1946] O.R. 859, [1947] 1 D.L.R. 554 (C.A); *Re Driscoll*, [1948] O.W.N. 124 (H.C.J.); *Re Jones*, [1955] O.R. 837, [1955] 5 D.L.R. 213 (H.C.J.); and *Re Hum Fong Shee*, *supra*, note 19.

again to confirm the report of the referee.[25] There is authority, however, holding that it is wrong to proceed in this manner; the proper procedure, it is said, is to apply to court for probate or letters of administration of the estate of the absentee.[26] In our view, this line of cases appears to be incorrect. Even if the court were to issue probate or administration on the basis of the presumption of death, this will not necessarily resolve the question of the absentee's claim on the estate to be distributed, since the question whether she had survived the testator or intestate will not be in issue on an application relating to the estate of the absentee. Furthermore, the parties concerned with the validity of the absentee's claim on the primary deceased's estate may well not be parties to the application for probate or administration. Notwithstanding this line of authority, the majority of Ontario cases have been willing to determine the question of the death of an absent beneficiary on the application of a personal representative of the deceased whose estate is to be distributed, without insisting upon any prior application for probate or administration of the estate of the absentee.[27]

A second procedure, which protects the personal representative, but does not yield a final distribution of the estate, is payment into court of the share of the absent beneficiary. This course of action is available on the final passing of accounts.[28] Payment into court frees the personal representative from liability, and permits anyone who claims to be entitled to a share to apply for payment out of court. If the applicant for payment out bases her claim on the death of the absentee, that issue will have to be resolved in order to decide the application. While the burden of proof is on the applicant, there have been cases in which the court ordered payment out of court on the basis that the absentee was dead, but accommodated a residual doubt as to the death of the absentee by requiring the applicant to enter into an undertaking for repayment should the absentee return.[29] Even if no such undertaking is given, as we have explained, a returning absentee would have the right to recover the property, so long as it could still be traced in the hands of the recipient, or to recover its value in a personal action against the recipient.

A final relevant statutory provision is section 35 of the *Trustee Act*, which allows a personal representative to be excused from a breach of

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[25] Rules 54 and 55 of the rules of court, *supra*, note 23, deal with directing a reference and the procedure on a reference, respectively.

[26] *Re Coots* (1910), 1 O.W.N. 807*n*, 17 O.W.R. 727 (H.C. Div.); *Re Leckie* (1924), 27 O.W.N. 266 (H.C. Div.); and *Re Bull*, [1934] O.W.N. 284 (H.C.J.).

[27] See, for example, *Re Ashman* (1907), 15 O.L.R. 42 (H.C.J.); *Re Peacock* (1915), 9 O.W.N. 175*n* (H.C.J.); and *Re Ramsay Estate*, [1943] O.W.N. 169, [1943] 2 D.L.R. 784 (H.C.J.).

[28] Courts may be asked to "pass" or audit the accounts of personal representatives: see *infra*, ch. 6, sec. 2(d). Section 36(4) of the *Trustee Act*, *supra*, note 16, provides that, where on the final passing of accounts of a personal representative there is found to be in his hands any money belonging to a person whose address is unknown, it is his duty to pay the money into court to the credit of that person. See *Re Calder* (1923), 24 O.W.N. 146 (H.C. Div.).

[29] *Re McNeil* (1906), 12 O.L.R. 208 (C.P. Div.), and *Re Fisher* (1923), 23 O.W.N. 568 (H.C. Div.).

trust.[30] Conceivably, it could relieve a personal representative from personal liability where she has not obtained the direction of the court or paid the absentee's share into court.

(iii) The Uniform Presumption of Death Act

On two occasions, the Uniform Law Conference of Canada has recommended draft legislation to meet the problems in the common law governing absentees. In 1960, the Conference of Commissioners on Uniformity of Legislation in Canada, which was the predecessor to the Uniform Law Conference of Canada, adopted a *Presumption of Death Act*,[31] which dealt with the jurisdiction of the court to make an order declaring that an absentee shall be presumed to be dead. In 1976, the Uniform Law Conference of Canada adopted the *Uniform Presumption of Death Act*,[32] which not only addressed the jurisdiction of the court to make a declaration of presumed death and the nature of that order, but also the extent to which the property of the absentee is to be safeguarded. Since the substance of the 1960 Act has been continued in large measure in the 1976 Act, we shall discuss the later Act, and refer to the earlier only where it is necessary to indicate an important distinction.

Five features of the 1976 Act are particularly noteworthy. First, it gives the court an independent power to make an order declaring that a person "shall be presumed to be dead for for all purposes, or for such purposes only as are specified in the order".[33] This would change the law dramatically, since the common law position is that a declaration of presumed death cannot be made by a court except when it is exercising some other jurisdiction, and that such a declaration is effective only for that purpose.

Second, in establishing the grounds upon which a declaration may be made, the Act does not require a seven-year period of absence or any other specified period.[34] This would change the law by making a declaration of

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[30] *Supra*, ch. 2, sec. 4(b).

[31] Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Forty-Second Annual Meeting* (1960), at 30, and Appendix T, at 115.

[32] Uniform Law Conference of Canada, *Proceedings of the Fifty-Eighth Annual Meeting* (1976), at 32, and Appendix V, at 225.

[33] *Uniform Presumption of Death Act*, *ibid.*, s. 2(1).

[34] Section 2(1) establishes the grounds upon which an order may be made:

> 2.—(1) Where, upon the application of an interested person by originating notice of motion, the court is satisfied that
>
> (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named;
>
> (b) the applicant has no reason to believe that the person is living; and

presumed death possible after an absence of less than seven years. However, there is a requirement that there be "reasonable grounds . . . for supposing that the person is dead". One can therefore surmise that, in most cases, a court would require a fairly long period of absence.

Like the common law, the Act does not specify what inquiries must be made or what advertisements must be placed in order to find the absentee. Since circumstances may vary considerably, it may have been thought that the rules could not easily be formulated in other than vague terms offering little, if any, guidance. Inquiries and perhaps advertisements would appear to be necessary to satisfy the "reasonable grounds" requirement.

The third feature is that an order declaring that a person is presumed dead must "state the date on which the person is presumed to have died".[35] This overcomes the common law incapacity to fix a date of death, which may lead to unnecessarily complex questions of survivorship. In most cases, the selection of a date, although arbitrary, will resolve problems of succession. In some cases, however, it will be sufficient to declare that the absentee was dead after a particular date and there will be no point in fixing a specific date of death.[36] Thus, the 1976 Uniform Act seems to go too far in making it mandatory to state the date of presumed death. Interestingly, the comparable provision in the 1960 *Presumption of Death Act* stipulated that the order must state either the date on which the person is presumed to have died or the date after which the person is presumed not to be living.

Fourth, with leave of the court, any interested person[37] may apply to the court for an order to vary, amend, confirm or revoke an order declaring a person to be presumed dead.[38]

(c) reasonable grounds exist for supposing that the person is dead,

the court may make an order declaring that the person shall be presumed to be dead for all purposes, or for such purposes only as are specified in the order.

[35] *Ibid.*, s. 2(2).

[36] Where, for example, the date of the testator's death is known and a beneficiary has disappeared after the death, the only question is whether the beneficiary was alive on the known date of death. If that can be established by means of the presumption, the date of the beneficiary's death is entirely irrrelevant. In such a case, the declaration need state only that the beneficiary has died after the date of the testator's death.

[37] Section 1(b) defines "interested person" as follows:

(b) 'interested person' means any person who is or would be affected by an order made under this Act and includes,

(i) the next of kin of the person in respect of whom an order is made or applied for, and

(ii) a person who holds property of the person in respect of whom an order is made or applied for.

[38] *Ibid.*, s. 2(3).

The fifth matter to which we wish to draw attention relates to the remedies available to a returning absentee. Under the Act, any distribution of the property of an absentee who has been declared to be presumed dead "shall be deemed to be a final distribution and to be the property of the person to whom it has been distributed as against the person presumed to be dead".[39] Where a person who has been declared to be presumed dead returns, she cannot recover property that has been distributed; she is protected only with respect to undistributed property.[40]

Legislation dealing with the presumption of death has been enacted in five provinces, the Yukon Territory, and the Northwest Territories. British Columbia enacted the first legislation in 1958,[41] which served as the model for the 1960 Uniform Act; it subsequently adopted the 1976 Act.[42] Similarly, Nova Scotia,[43] the Northwest Territories,[44] and the Yukon Territory[45] adopted the 1960 Act, and then replaced it with the 1976 Act. Newfoundland,[46] and Manitoba,[47] New Brunswick[48] have adopted the 1960 Act.

Although either the 1960 Act or the 1976 Act has been followed in these jurisdictions, in some cases certain modifications have been introduced in the legislation. Under the Nova Scotia *Presumption of Death Act*, on every application for an order for a declaration of presumed death or appeal from such an order, the Public Trustee must be served with the relevant documents, and she "shall be entitled to make representation to ensure that the interest and the property of the person in respect of whom the order is sought or the appeal made are protected".[49] The Manitoba *Presumption of Death Act* requires that notice of the application be given.[50]

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[39] *Ibid.*, s. 4(1).

[40] Section 4(2) provides that, "[w]here a person who is presumed to be dead is found by the court to be alive, the court may, upon the application of any interested person . . . by order give such directions the court considers appropriate respecting the property of the person found to be alive and its preservation and return".

[41] *Survivorship and Presumption of Death Act*, S.B.C. 1958, c. 57.

[42] See, now, *Survivorship and Presumption of Death Act*, R.S.B.C. 1979, c. 398.

[43] See, now, *Presumption of Death Act*, R.S.N.S. 1989, c. 354.

[44] See, now, *Presumption of Death Ordinance*, O.N.W.T. 1978 (2d Sess.), c. 10.

[45] See, now, *Presumption of Death Act*, R.S.Y.T. 1986, c. 135.

[46] *The Presumption of Death Act*, R.S.N. 1970, c. 304.

[47] *The Presumption of Death Act*, R.S.M. 1987, c. P120.

[48] *Presumption of Death Act*, S.N.B. 1974, c. P-15.1.

[49] *Supra*, note 43, s. 8.

[50] *Supra*, note 47, s. 2(3). In the case of an application for an order declaring that a person shall be presumed dead for all purposes, notice must be given by publication of an advertisement in a newspaper having general circulation in the area in which the person was last

While the New Brunswick *Presumption of Death Act* follows the 1960 Uniform Act, it deals differently with the question of the remedies available to a returning absentee whose property has been distributed. The New Brunswick Act provides that "any estate distributed shall be deemed to be a final distribution and to be the property of the person to whom it is distributed as against the person presumed dead, and is not subject to recovery by that person".[51] However, it also gives the court power to order a reconveyance of the estate of the absentee, in whole or in part, or payment of an amount representing that value, "if, in the opinion of the court, having regard to the circumstances of the case, including any inconvenience or hardship that would be imposed upon the person subject to the order, the making of such an order would be just".[52]

(iv) Recommendations

In Ontario, where a beneficiary is missing, the present law and practice do not facilitate the expeditious administration of estates. The problems can be easily summarized. Courts have no jurisdiction to make a declaration of presumed death, except in the exercise of some other jurisdiction, and the effect of any such declaration is confined to the proceedings in which it is given. The available procedures for securing a declaration are circular and unduly complicated.[53] Moreover, in making a declaration that a person is presumed to be dead, a court has no power to fix the date of death, which may leave unresolved critical questions of survivorship. Finally, the right of a returning beneficiary to exercise remedies against a recipient of her share in an estate is disruptive of the orderly and expeditious distribution of estates.

We believe that the deficiencies of the present law and practice can be cured by adopting the 1976 *Uniform Presumption of Death Act* with certain modifications. The Act offers a simple procedure that culminates in a declaration of presumed death that is good for all purposes or for whatever purposes are specified in the order making the declaration. We therefore recommend that the *Uniform Presumption of Death Act* should be enacted, subject to the comments that follow.

We believe that three changes are necessary. First, under the Uniform Act the court is required to state the date on which the person is presumed to have died. Yet in some cases, it will be sufficient simply to declare that

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known to reside and to such other persons as the court may direct. In the case of other orders under the Act, notice of the application must be given in such manner and to such persons as the court may direct.

[51] *Supra*, note 48, s. 6(1).

[52] *Ibid.*, s. 6(2).

[53] Earlier we explained that an application under r. 14.05(3) of the rules of court, *supra*, note 23, may entail 3 court appearances—before the judge initially, then the referee, and finally before the same judge again.

the absentee is presumed dead after a particular date, and there would be no point in fixing a specific date of death. We prefer the approach taken in the 1960 *Presumption of Death Act*, and recommend that the legislation should permit the court to state the date upon which the absentee is presumed to have died or to state the date after which the person is presumed not to be living.

Second, we are of the view that, in all applications in which a declaration of presumed death is sought, the interests of absent persons should be represented. Depending on the circumstances, a declaration may detrimentally affect entitlement to share in the estate, and it may be in the interest of all other parties to the proceeding to have the person in question presumed dead. We are of the view that, in most cases, a public official should be given this responsibility. In this regard, we agree with the approach taken in Nova Scotia *Presumption of Death Act*, which identifies the Public Trustee as the appropriate public official to protect absentees. The other public official who might have been given this duty, the Official Guardian, often would be representing children whose entitlement to inherit property would be in issue and would be arguing in favour of a declaration of presumed death. We are also of the view that the court should be given the power to appoint a person other than the Public Trustee to represent absentees where it considers it more appropriate. In the exercise of this authority, it might appoint the Official Guardian where that office is not otherwise involved in the application. Accordingly, we recommend that either the Public Trustee or, where the court considers it more appropriate, a person appointed by the court, should be a party to all applications to have a person declared to be presumed dead.

The third change concerns the remedies available to a returning absentee who has been declared to be presumed dead. Under the *Uniform Presumption of Death Act*, a returning absentee has no remedy if her share has been distributed to another; she is protected only with respect to undistributed property. In our view, the court should have jurisdiction to order the return of the property, or its value, in the rare case where an absentee does return and claims her property. Difficulty, however, lies in deciding whether the returning absentee or the recipient should bear the burden of persuading the court to make an order in her favour. While there are equities on either side, we believe that the policies in favour of the finality of distribution and in favour of benefitting living recipients justify placing the burden of persuasion on the absentee. We therefore recommend that, where a person who is presumed to be dead returns after her property has been distributed, she should be entitled to apply to the court for the return of her property or payment of its value. The court should be required to order the return of the property, in whole or in part, or payment of its value, to the absentee only if that person demonstrates that it would be more equitable to return all or part of the property to her or make a payment in her favour. In applying this jurisdiction, the court might consider various factors, such as whether there has been any fault on the part in the absentee that contributed to her not being found or whether there has been detrimental reliance on the part of the recipient. We further recommend that, in making an order

in the exercise of this power, the court should be empowered to impose such terms and conditions as is appropriate in the circumstances. For example, where the court concludes that the balance of the equities does favour that the property be given to the absentee, it may be appropriate for the recipient to be compensated for any improvements made to the property.

Before turning to the next topic, we wish to make a further recommendation. The issue whether a person is presumed to have died is important in contexts other than that of estates administration. The matter has been addressed by the provisions of the *Conveyancing and Law of Property Act*,[54] the *Insurance Act*,[55] and the *Marriage Act*.[56] In recommending the adoption of the *Uniform Presumption of Death Act* in Ontario, our intention is that this will be a general statute, applicable in all situations in which the death of a person is an issue, including those already addressed by existing legislation. Given our focus in this project on estates administration, we have not examined the *Conveyancing and Law of Property Act*, the *Insurance Act*, the *Marriage Act*, or indeed any other Ontario statute dealing with this issue, to determine whether our recommendation to adopt the *Uniform Presumption of Death Act* would create any problems. We therefore recommend that the provisions of the *Conveyancing and Law of Property Act*, the *Insurance Act*, the *Marriage Act*, and any other Ontario statute dealing with the presumption of death be examined in light of our recommendation to adopt the *Uniform Presumption of Death Act* with the changes we have proposed.

(c) Unascertained Beneficiaries

(i) General

In many cases, personal representatives are required to distribute estates to a class of persons identified in the will or entitled to share under the provisions of the *Succession Law Reform Act* governing intestacy.[57] Difficulties may be caused where it is not known whether the class of persons ever existed or, if so, whether any of its members are still living.

We must emphasize that we are not concerned with problems in ascertaining beneficiaries caused by poor will drafting. Where vague or ambiguous language is used to describe beneficiaries, the difficulty is one of construction. The problem with which we are concerned assumes a clear description of the class of beneficiaries, and is caused by the fact that it is necessary to determine its membership. This raises questions respecting the extent of the duty of the estate trustee to inquire into the existence of beneficiaries, and the power of the estate trustee to make a binding distribution of the estate

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[54] R.S.O. 1980, c. 90, ss. 46-51.

[55] R.S.O. 1980, c. 218, ss. 149, 150, 186-89, and 190.

[56] R.S.O. 1980, c. 256, ss. 9 and 14(c).

[57] *Succession Law Reform Act*, *supra*, note 7, s. 47.

to the exclusion of beneficiaries of whose existence she is unaware. While such problems have always been present in estates administration, they have been heightened in Ontario since the law was amended to include children born outside marriage in the classes of persons entitled to inherit on an intestacy or under a class gift in a will.[58]

With this major substantive change in the law, an attempt was made to address the difficulties of ascertainment that would inevitably accompany it. Section 23 of the *Estates Administration Act*[59] provides as follows:

> 23.—(1) A personal representative shall make reasonable inquiries for persons who may be entitled by virtue of a relationship traced through a birth outside marriage.
>
> (2) A personal representative is not liable for failing to distribute property to a person who is entitled by virtue of a relationship traced through a birth outside marriage where,
>
> (a) he makes the inquiries referred to in subsection (1) and the entitlement of the person entitled was not known to the personal representative at the time of the distribution; and
>
> (b) he makes such search of the records of the Registrar General relating to parentage as is available for the existence of persons who are entitled by virtue of a relationship traced through a birth outside marriage and the search fails to disclose the existence of such a person.
>
> (3) Nothing in this section prejudices the right of any person to follow the property, or any property representing it, into the hands of any person other than a purchaser in good faith and for value, except that where there is no presumption or court finding of the parentage of a person born outside marriage until after the death of the deceased, a person entitled by virtue of a relationship traced through the birth is entitled to follow only property that is distributed after the personal representative has actual notice of an application to establish the parentage or of the facts giving rise to a presumption of parentage.

Section 23 gives personal representatives a highly desirable measure of certainty and protection. Where their reasonable inquiries and searches have not revealed a person entitled to share in the estate,[60] they will not be liable to any person to whom they have failed to distribute property.

With respect to beneficiaries other than children born outside marriage, there are no clear rules concerning the extent of the inquiries that must be

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[58] *The Succession Law Reform Act, 1977, supra*, note 2. See, now, *Succession Law Reform Act, supra*, note 7.

[59] R.S.O. 1980, c. 143. Section 23 had been originally enacted as s. 28 of *The Devolution of Estates Act*, R.S.O. 1970, c. 129 by s. 50(2) of the *The Succession Law Reform Act, 1977, supra*, note 2.

[60] For a discussion, see Archibald, *supra*, note 24, at 74-79.

undertaken by a personal representative to find persons who may be entitled to share in the estate of a deceased. Personal representatives have been held liable for *devastavit* for not making sufficient inquiries, but the precise nature of the inquiries that should be made has not been clarified.[61] Even if the personal representative has been as careful as possible in making inquiries and advertising, it is not clear that she would be protected from liability in *devastavit* to an overlooked beneficiary. Certainly, apart from section 23(2) of the *Estates Administration Act*, there is no statutory provision specifically relieving a personal representative from liability for failing to distribute an estate to someone whose existence was not disclosed by reasonable efforts.

In the case of persons born outside marriage and other types of unascertained beneficiary, if the personal representative is unable to find anyone, or wishes to deal with the possibility that someone may exist, an application may be brought under the rules of court so that a reference can be directed to inquire into and report on who is entitled to share in the estate. The other course of action available to a personal representative would be to make a payment into court of that part of the estate to which an unascertained beneficiary may have a claim. Should a personal representative fail to use either procedure, but otherwise act with due care, relief from liability may be available under section 35 of the *Trustee Act*, provided that the court finds that she "has acted honestly and reasonably, and ought fairly to be excused".[62]

(ii) Recommendations

The present law relating to unascertained beneficiaries is in need of change. As we have indicated, it is not clear what inquiries are required of a personal representative, who risks personal liability should she ignore an unascertained beneficiary in making a distribution.

In evaluating the present law, we have weighed the interest of the unascertained beneficiaries in receiving a share in the estate, either directly or by tracing, against the policy favouring efficient distribution of estates, security of title for recipients, and protection of estate trustees from unwarranted personal liability. Consistent with the recommendations that we have already proposed in connection with missing beneficiaries and the presumption of death, we believe that the interests of unascertained beneficiaries should be subordinated to the public interest in favour of efficient distribution, security of title, and protection of estate trustees who have acted reasonably.

We agree with the balancing of interests effected by section 23 of the *Estates Administration Act*, except for the way in which the issue of tracing

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[61] *Re Short Estate*, [1941] 1 W.W.R. 593 (B.C.S.C.).

[62] *Supra*, note 16. For a discussion of these procedures, see *supra*, this ch., sec. 2(b)(i).

has been resolved. We see no reason why the basic policy of section 23 should not be extended beyond the context of persons who are entitled by virtue of a relationship traced through a birth outside marriage to unascertained beneficiaries and next-of-kin generally. Persons born outside marriage constitute simply one type of unascertained beneficiary. We therefore recommend that the law and practice governing claims by all types of unascertained beneficiaries and next-of-kin should be governed by rules similar to those set out in section 23 of the *Estates Administration Act*, subject to the change we propose below.

Accordingly, consistent with section 23(1) and (2)(a) of the *Estates Administration Act*, we recommend that, where an estate trustee has made "reasonable inquiries" for beneficiaries and next-of-kin, and the entitlement of a person was not known to the estate trustee at the time of distribution, she should not be liable to that person for failing to distribute property to her. We further recommend that, in the case of persons who are entitled by virtue of a relationship traced through a birth outside marriage, the substance of section 23(2)(b) of the *Estates Administration Act* should also continue to apply to estate trustees. In other words, estate trustees should be required to search the records of the Registrar General relating to parentage, and should not be liable for failing to distribute property to a person who is entitled by virtue of a relationship traced through a birth outside marriage if reasonable inquiries have been made and the search has failed to disclose the existence of that person.

As we have indicated, we disagree with the approach to tracing taken in section 23(3) of the *Estates Administration Act*. Section 23(3) does not affect the usual rights to trace property, except in the case where there is no presumption or court finding of parentage until after the death of the deceased. As we have explained, the usual right to follow property allows a person to bring proceedings against the recipient of her property. Pursuant to section 23(3), where there is no presumption or court finding of parentage until after the death of the deceased, a person entitled to property by virtue of a relationship traced through a birth outside marriage is entitled to follow only property distributed after the personal representative has had actual notice of an application to establish parentage or of the facts leading to a presumption of parentage. Property distributed before the personal representative has actual notice cannot be followed at all.

We are of the view that the proper approach to this matter is the one we proposed in connection with beneficiaries who have been declared to be presumed dead and who return to claim a share of an estate. This approach is in furtherance of the public interest favouring efficient distribution. Accordingly, we recommend that section 23(3) of the *Estates Administration Act* should be repealed and replaced by a provision stating that, where a person whose existence was not ascertained prior to the distribution of the estate seeks to claim her share of the estate, which already has been distributed, she should be entitled to apply to the court for a return of her share or payment of its value. The court should be required to order the return of the property, in whole or in part, or payment of its value, to the

returning absentee only if that person demonstrates that it would be more equitable to return all or part of the share to her or make a payment in her favour. We further recommend that, in making an order in the exercise of this power, the court should be empowered to impose such terms and conditions as is appropriate in the circumstances.

It is probably the existing law that inquiries that have been made in accordance with court directions or that have received subsequent court approval would satisfy the requirement of "reasonable" inquiries imposed by the legislation. However, we are of the view that this should be made explicit by legislation. We therefore recommend that, where all inquiries and advertisements have been made in accordance with the direction of the court, or where they have been subsequently approved by the court, the estate trustee should be free from personal liability for failing to distribute the estate to those persons whose existence was not revealed.

3. MISCELLANEOUS RULES RESPECTING BEQUESTS AND DEVISES

(a) Legacies to Persons Who Have Received *Inter Vivos* Gifts from the Deceased

A problem that may arise in estate administration is whether the entitlement of a person should be affected by the fact that she has received a gift during the lifetime of the deceased. At present, the general rule is that the making of a gift by the testator does not prevent the donee of the gift from also claiming a benefit under the will. It is assumed that the testator had intended the donee to have both the *inter vivos* gift and the testamentary gift.

There is a very narrow exception to the general rule; it may arise where the testator is the father[63] of, or stands *in loco parentis* to, the beneficiary who has received the *inter vivos* gift. If, after providing for his children in his will, a testator makes a substantial *inter vivos* gift to one of them that is similar in nature to that in the will,[64] the courts will presume that the *inter vivos* gift was intended as an advance out of the legacy; accordingly, the gift will be brought into account in determining the shares of the other children, and will be debited to the share of the donee child. Since the effect of this equitable doctrine is to reduce or extinguish a legacy, some refer to it as "equitable ademption" or "ademption by advancement". It is also known

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[63] According to the standard texts, the exception is applicable to fathers. For the principle to apply to mothers, they would have to stand *in loco parentis* to the beneficiary: see, for example, Williams, Mortimer and Sunnucks, *supra*, note 18, at 857-58, and Feeney, *supra*, note 2, Vol. 2, at 209, *n*.179. Today, one would expect a court to apply this exception in the case of both mothers and fathers.

[64] It is said that "[t]he second portion must ejusdem generis with the first": *Halsbury's Laws of England*, Vol. 16 (4th ed., 1976), at 954, para. 1415.

as "the presumption against double portions", since the doctrine applies generally only where both the legacy and the *inter vivos* gift constitute "portions".[65]

The purpose of this doctrine is to do justice among the children of a testator. It applies only to a gift to a child, and then only if the application of the doctrine would benefit another child or children. The rule, however, is only a presumption, and will be displaced by evidence that the testator did not intend the *inter vivos* gift to be an advancement out of the legacy.[66]

In Ontario, the doctrine of ademption by advancement has been extended to intestacy by section 24 of the *Estates Administration Act*.[67] The doctrine has also been extended to gifts of realty. Under section 24, for the doctrine to apply, the advancement must be expressed by the intestate or acknowledged in writing by the child to be by settlement or portion. In the absence of such a writing from either the intestate or the child, the child would take her full share on an intestacy, as well as the *inter vivos* gift.

We believe that this is an area of the law where codification and simplification would be desirable. In the case of children, different rules apply depending on whether there is a will or an intestacy. We consider that the

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[65] "A portion is a sum of money given to a child, by way of advancement, on marriage, or for the purpose of establishing him in business, or as a permanent provision, and in general it is only such a gift which will operate as a satisfaction of a prior gift": *ibid.*, at 950, para. 1409.

[66] For a discussion of this doctrine, see Feeney, *supra*, note 2, Vol. 2, at 208-12; Williams, Mortimer and Sunnucks, *supra*, note 18, at 857-60; and *Halsbury's Laws of England*, Vol. 16 (4th ed., 1976), at 948-56, paras. 1407-18.

[67] *Supra*, note 59. Section 24 provides as follows:

> 24.—(1) If a child of an intestate has been advanced by the intestate by settlement or portion of real or personal property or both, and the same has been so expressed by the intestate in writing or so acknowledged in writing by the child, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal property of the intestate to be distributed under this Act, and if the advancement is equal to or greater than the amount of the share that the child would be entitled to receive of the real and personal property of the intestate, as so reckoned, then the child and his descendants shall be excluded from any share in the real and personal property of the intestate.
>
> (2) If the advancement is less than the share, the child and his descendants are entitled to so much only of the real and personal property as is sufficient to make all the shares of the children in the real and personal property and advancement to be equal, as nearly as can be estimated.
>
> (3) The value of any real or personal property so advanced shall be deemed to be that, if any, which has been acknowledged by the child by an instrument in writing, otherwise the value shall be estimated according to the value of the property when given.
>
> (4) The maintaining or educating of, or the giving of money to, a child without a view to a portion or settlement in life shall not be deemed an advancement within the meaning of this Act.

approach taken in the case of intestacy—that is, treating an *inter vivos* gift as an advance only if that intention has been evidenced in writing—is more realistic than the presumption that, in the case of a will, the testator did not intend the donee to have both the *inter vivos* gift and the testamentary gift. The policy of section 24, in our view, should apply to wills as well.

We have also concluded that, if this change were implemented, there would be no reason to restrict the applicability of the amended section 24 to parents or persons standing *in loco parentis* and their children.We can see no reason why children should be in a worse position than anyone else. The nature of the relationship between the deceased donor and the beneficiary donee would seem to be entirely irrelevant to the question whether a gift should be considered in determining the interest of a beneficiary.

Accordingly, we recommend that section 24 of the *Estates Administration Act* should be amended to apply to both testate and intestate succession. As amended, it should provide that only where a person receives an *inter vivos* gift that has been expressed by the donor in writing or acknowledged by the donee in writing to be an advance on the future inheritance of the latter should the value of the gift be taken into account in determining her share in the estate of the donor. We further recommend that this rule should apply without reference to the relationship between the deceased donor and the donee.

(b) Legacies Contracted For

A person may contract to make a will containing certain dispositions, or contract not to revoke an existing will or not to make a will at all. In each case, the substance of the promise is that the promisee will acquire certain property by way of succession on the death of the promisor.[68]

Despite the agreement, the promisor may make or revoke a will in violation of the contract, and any such will or revocation will be valid. In most cases, courts will not compel the promisor to make a will in accordance with her contract;[69] nor will they deny her the power to make an inconsistent will. However, a disappointed promisee may obtain the usual remedies for breach of contract, to the extent that they are applicable. As in the case of contracts generally, breach of a contract relating to a will entitles the promisee to damages from the estate of the promisor. The measure of damages will be the value of the benefit that the promisee would have received had

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[68] See, generally, Campbell, "Promises to Make Testamentary Provision" (1947), 23 N.Z.L.J. 221; Cretney and Dworkin, *Theobald on Wills* (13th ed., 1971), ch. 11; Feeney, *supra*, note 2, Vol. 1, at 17-21; and Maddaugh and McCamus, *The Law of Restitution* (1990), at 474-81.

[69] However, on the death of the promisor, a remedy analogous to specific performance occasionally has been ordered. In one case, the court ordered that the estate be distributed as if the promised testamentary disposition had been made: *Synge v. Synge*, [1894] 1 Q.B. 466, [1891-94] All E.R. 1164 (C.A.).

the promised testamentary provision been made. Indeed, damages have been awarded even for an anticipatory breach in the lifetime of the promisor; this has occurred where the contract was to leave the promisee, by will, a specific asset that was subsequently sold by the testator.[70] Of course, if the promise were to take the form of an undertaking not to revoke an existing will or not to make a will, that would be a promise that could be broken during the life of the promisor.

Contracts relating to testamentary dispositions nevertheless present dangers to promisees, as some common situations are not adequately addressed under the existing law of contract. The main difficulties for the promisee can be briefly summarized.[71] First, even if the testator has made her will in conformity with her agreement, if the provision in the will becomes inoperative by operation of law, the courts do not consider this to be a breach of contract. Consequently, where a will is revoked by marriage[72] or where a promised disposition lapses,[73] no contractual remedy will be available to a disappointed promisee. Second, even though the will does reflect the contract made by the testator, the promised disposition may be defeated or reduced by an order for the support of dependants under Part V of the *Succession Law Reform Act*. Third, if the contract is to make a disposition of a specific asset or a particular sum, and an insufficiency of assets leads to abatement or defeat of that disposition, the promisee will have an action for breach of contract. By contrast, where the will makes the promised disposition and that disposition consists of a share of the estate or part of the residue, the promisee will not have an action for breach of contract where the disposition turns out to be worthless. Since the promised disposition appears in the will, the contract is considered to be performed. Fourth, if the contract relates to land, it will not be enforceable if it is not in writing, as required by the *Statute of Frauds*.[74] Fifth, like any other agreement, the contract will not be enforceable if it is based on past consideration; the most common example is housekeeping services rendered prior to the promise. Finally, the contract, like any other, may be too vague or uncertain to be enforced.

While a remedy may be unavailable under the law of contract, a promisee may be entitled to a restitutionary remedy in certain of the situations described above. In the case of an agreement that is unenforceable under the *Statute of Frauds* and a contract that is too uncertain or vague to be enforced, restitution is available. In the case of a contract based on past consideration, the availability of a restitutionary remedy is a possibility; it

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[70] *Synge v. Synge*, *ibid.*

[71] This discussion is drawn from Coote, "Testamentary Promises Jurisdiction in New Zealand", in Northey (ed.), *The A.G. Davis Essays in Law* (1965) 1, at 3-4.

[72] *Re Marsland*, [1939] Ch. 820, [1939] 3 All E.R. 148 (C.A.).

[73] *Re Brookman's Trusts* (1869), 5 Ch. App. 182, 39 L.J. Ch. 138.

[74] R.S.O. 1980, c. 481, s. 1.

would not be available, however, if the services were rendered merely with the hope, as opposed to expectation, of reward. In the other situations – where the contract is considered to have been performed – the law of restitution does not provide a remedy.

In a situation where a restitutionary remedy may be available, the following principles apply:[75]

> [T]he modern Canadian case law has established an entitlement to restitutionary recovery for benefits unofficiously conferred under the expectation of reward, even where that expectation cannot be said to have been induced by a clear promise by the recipient that compensation would be made. If services, for example, are provided in circumstances where the recipient knows or ought to know that they are being rendered in the expectation of reward, an *in personam* claim for their value will lie.[76]

Against this background, we are of the view that there is a need for legislative intervention on behalf of non-family persons who have performed unpaid or underpaid services for the deceased promisor on the faith of an express or implied promise that they will receive a testamentary disposition. They should not be left without any recourse where a remedy cannot be found in the law of contract or the law of restitution. In other situations, we would leave the problems that we have identified, which are inherent in the interaction of the law of contract and the law of wills, to be resolved by professionally drafted agreements. Such agreements are not likely to be used in the case of persons who have rendered services to the deceased.

We have taken the view that, in most cases of this type, the promisee is a housekeeper, who occupies a quasi-family position. We have therefore concluded that the existing vehicle of Part V of the *Succession Law Reform Act* might be used to deal equitably with the parties.

Part V enables the court to make an order for adequate provision for proper support in favour of a "dependant" out of an estate of a testator or intestate. In this context, a "dependant" is a spouse, parent, child, brother or sister of the deceased who was being supported by the deceased or was legally entitled to that support.[77] On an application for an order for support, the court is required to take into account all the circumstances and, in particular, must consider a number of factors. Among the factors listed are "the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions" and "any agreement between the deceased and the dependant".[78] If the dependant is a spouse,

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[75] Maddaugh and McCamus, *supra*, note 68, at 480.

[76] Maddaugh and McCamus, *ibid.*, observe that "[r]elief, *in rem*, through the device of the constructive trust, has rarely been granted in the reported case law."

[77] *Succession Law Reform Act*, *supra*, note 7, s. 57(d), as en. by S.O. 1986, c. 53, s.2.

[78] *Ibid.*, s. 62(1)(h) and (m), as en. by S.O. 1986, c. 53, s.4.

the court must consider "any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support".[79] In making a support order, the court has power to impose whatever conditions and restrictions it considers appropriate.[80]

Of course, where persons who have rendered services in reliance on a promise by the deceased qualify as "dependants" within the meaning of Part V of the *Succession Law Reform Act*, they will be able to avail themselves of a remedy. The difficulty arises with respect to persons who do not meet the statutory definition. In their case, we propose that the provisions of Part V of the *Succession Law Reform Act* should be made applicable to them.

We therefore recommend that, for the purpose of Part V of the *Succession Law Reform Act*, the definition of "dependant" should be expanded to include a person who has rendered housekeeping or other domestic services for a deceased person in the deceased's lifetime, and who has established an express or implied promise by the deceased, whether or not enforceable under the law of contract, to reward her for the services by making some testamentary provision.

Before turning to consider the next topic, we wish to address another issue. Section 71 of the *Succession Law Reform Act* provides that, where a testator gives property by will pursuant to a contract, that property is liable to an order made under Part V only to the extent that the value of the property exceeds the consideration therefor. Where, however, the promised testamentary disposition has not been made, the disappointed promisee would be entitled to damages from the estate equal to the value of the property promised; she would thus rank as a creditor of the estate, and would take in priority to a person entitled to an order under Part V. To meet this problem, we favour an approach similar to that taken in section 71. Accordingly, we recommend that, where the promise is not fulfilled and the promisee is successful in damages in a contract action, the damages recovered should be subject to the provisions of an order made under Part V, to the extent that the amount of the damages exceeds the consideration therefor.

(c) Conditions Not to Contest a Will

A testamentary gift may be given on condition that the gift is to be void should the named donee dispute the validity of the will. If the donee challenges the will successfully, the condition will fall with the balance of

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[79] Ibid., s. 62(1)(r)(vi), as en. by S.O. 1986, c. 53, s.4.

[80] *Ibid.*, s. 63(1). Payment may take a variety of forms: see *ibid.*, s. 63(2). For other powers of the court, see ss. 64-66.

the will. Where, however, the challenge is unsuccessful, whether the condition will be effective to deny the beneficiary the gift depends on the circumstances.

Under Anglo-Canadian law, conditions not to contest a will are generally valid.[81] If attached to gifts of realty, they are valid without qualification. If attached to gifts of personalty, they are valid if there is a gift over in the event of a breach of the condition;[82] in the absence of a gift over, the condition will be regarded as *in terrorem* — that is, in the nature of a threat — and therefore void. Such conditions apparently do not run afoul of the public policy against ousting the jurisdiction of the court because they do not altogether preclude litigation relating to the estate.[83]

Conditions not to contest a will may be drafted either as conditions precedent or conditions subsequent. A condition precedent identifies an event that must occur for the gift to come into existence. An example of such a condition is the following: "provided that A does not bring any proceedings in court challenging the validity of this will, she will receive a legacy of $5,000 when she reaches the age of 16". A condition subsequent describes an occurrence that will cause a gift that has already taken effect to end. An example of such a condition is the following: "I give A a legacy of $5,000 but, if she brings any proceedings in court challenging the validity of this will, this legacy shall not be given to A, but become part of the residue of my estate." If a gift is contingent on a condition precedent, and the condition is held to be void, the gift will fail.[84]

In our view, the law in this area is unnecessarily complex. It distinguishes between gifts of realty and gifts of personalty and, in the latter case, between conditions with gifts over and conditions without gifts over. These technical and artificial rules have no place in a modern legal system.

Conditions against challenging a will are detrimental because they might discourage litigation that might expose incapacity, undue influence, fraud, or forgery. The various grounds of invalidity of a will are designed to protect

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[81] Feeney, *supra*, note 2, Vol. 2, at 255-56, and Williams, Mortimer and Sunnucks, *supra*, note 18, at 749-50.

[82] Feeney, *supra*, note 2, Vol. 2, at 256, explains as follows:

> The reason for the rule is that the court considers an express gift over to someone else sufficient *prima facie* evidence that the gift was not *in terrorem*; the presence of the gift over tending to show that the condition was inserted not simply to coerce the original donee but also to fix a possible benefit to another.

[83] Feeney, *supra*, note 2, Vol. 2, at 256, and Cretney and Dworkin, *supra*, note 68, para. 1597, at 589.

[84] Feeney, *supra*, note 2, Vol. 2, at 225, notes that "[i]t is not always easy to tell whether a condition attached to a gift creates an interest subject to a condition precedent, in which case the gift is said to be contingent, or whether it creates a vested interest which is subject to divestment".

the deceased's family, who would take on an intestacy, from an exercise of testamentary power that is not a free and deliberate act by the testator. We therefore recommend that any provision in a will designed to preclude or discourage an application to the court with respect to the validity of a will should be void, regardless of whether it is attached to a gift of realty or personalty, or whether it is coupled with a gift over.

We have already noted that, where a condition not to contest a will that is regarded as a condition precedent is held to be void, the gift attached to that condition will fail because satisfaction of the condition is a prerequisite to the gift coming into existence. We consider that it is unfair that a beneficiary who has been successful in nullifying a condition that we regard as inimical should, in effect, be punished by losing a gift to which she otherwise would have been entitled under the will. We therefore recommend that, if the provision is a condition precedent, the provision should be void, but the gift should not fail for that reason. This will assimilate the position of conditions precedent to that of conditions subsequent.

(d) Homicide by a Beneficiary

Where a beneficiary kills a testator or intestate, certain questions arise. Should the killer be allowed to receive a benefit to which he would otherwise be entitled upon the death of the victim? If the killer is not permitted to enjoy the fruits of his wrong, how should the victim's property be distributed?[85]

At common law, these problems were solved by the application of the archaic doctrines of attainder, forfeiture, corruption of blood and escheat.[86] Following the abolition of these doctrines in the nineteenth century, courts were called upon to resolve various questions raised by the killing of a person by his beneficiary.[87] The most fundamental question was whether the killer should be allowed to benefit from the death of his victim. The courts developed certain rules, which continue to govern this matter in Ontario. In England, the common law recently took a somewhat different direction and, in 1982, legislation was enacted to address certain problems.[88] We shall first

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[85] For a recent discussion, see Maddaugh and McCamus, *supra*, note 68, at 483-506.

[86] The general effect of these doctrines was to deprive a criminal of his property when he had committed treason or a felony: see, generally, Tarnow, "Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates" (1980), 58 Can. Bar Rev. 582, at 582.

[87] The concept of forfeiture was re-introduced in 1988 in connection with offences defined as "enterprise crime offences": *Criminal Code*, R.S.C. 1985, c. 42 (4th Supp.), s. 462.37(1), as en. by S.C. 1988, c. 51, s.2. See, also, *Food and Drugs Act*, R.S.C. 1985, c. F-27, and *Narcotic Control Act*, R.S.C. 1985, c. N-1.

[88] *Forfeiture Act 1982*, c. 34 (U.K.). For a discussion, see Cretney, "The *Forfeiture Act 1982*: the Private Member's Bill as an Instrument of Law Reform" (1990), 10 Oxford J. Legal Stud. 289.

discuss the present position in Ontario, and then consider the recent changes in the United Kingdom.

In Ontario, a person who kills another cannot share in the estate of the victim.[89] Nor can a beneficiary under an insurance policy receive benefits where he has killed the insured.[90] These rules reflect the application of the general public policy rule that a person should not be permitted to benefit from his own wrongdoing.

The ambit of the rule "preventing the acquisition of property by killing"[91] is not settled. While it is well-established that it applies to a person who has murdered his victim, its applicability to other crimes resulting in death is uncertain. In *Lundy v. Lundy*,[92] the Supreme Court of Canada held that no distinction should be drawn between murder and manslaughter, and implied that the rule would apply to all crimes. A 1985 Ontario case held the rule to apply where a widow had pleaded guilty to criminal negligence causing the death of her husband.[93] However, a recent treatise on the law of restitution argues that the public policy rule should be confined to crimes in which the wrongdoer has intentionally caused harm to the victim, and suggests that support for this view may be found in the jurisprudence.[94] Where death is caused not by a contravention of the *Criminal Code*, but by an offence under provincial legislation, it appears that the rule would not apply.[95]

The application of the public policy rule precluding the killer from inheriting from the deceased necessarily involves the court in ruling on the disposition of the property to which the killer would have otherwise been entitled. The usual solution is to distribute the estate of the victim as if the killer had predeceased the victim. Where the killer is a legatee, the legacy

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[89] *Re Charlton* [1969] 1 O.R. 706, (1968), 3 D.L.R. (3d) 623 (C.A.).

[90] *Cleaver v. Mutual Reserve Fund Life Ass'n*, [1892] 1 Q.B. 147, [1891-4] All E.R. Rep. 335 (C.A.), and *Deckert v. Prudential Insurance Co.of America*, [1943] 3 D.L.R. 747, [1943] O.R. 448 (C.A.).

[91] Youdan, "Acquisition of Property by Killing" (1973), 89 L.Q. Rev. 235.

[92] (1895), 24 S.C.R. 650.

[93] *Re Ontario Municipal Employees Retirement Board and Young* (1985), 49 O.R. (2d) 78, 15 D.L.R. (4th) 475 (H.C.J.).

[94] In *The Law of Restitution*, *supra*, note 68, at 494, Maddaugh and McCamus argue as follows:

> As a general proposition, we would suggest that whenever a party commits a wrongful act, whether it be serious or not, with the express motive of obtaining some benefit from his victim, that party ought not be permitted to retain the benefit. Beyond this, in the absence of such a specific motive, we would argue that, so long as the wrongdoer commits a crime with the intention of causing harm to another, he should be prohibited from acquiring any benefits that come to him as a direct result of the wrong done to the person to whom he intended, and did in fact, harm.

[95] *Shaw v. Gillian* (1982), 40 O.R. (2d) 146, 143 D.L.R. (3d) 232 (H.C.J.).

will become part of any residuary gift under the will; in the absence of a residuary gift, or where the killer is the sole residuary legatee, the property will be distributed as if the victim died intestate. Where the beneficiary under an insurance policy kills the insured, the proceeds of the policy will be payable to the victim's estate, unless there is an alternative beneficiary.[96]

Cases where the killer has committed suicide following the murder of his victim indicate that the public policy rule also precludes inheritance by persons claiming property through the killer. In such circumstances, the estate of the victim has been distributed as if the killer had predeceased the victim.[97] Where, however, persons who would have inherited the victim's property through the estate of the killer have rights of inheritance that arise independently of their relationship with the killer, either as direct beneficiaries or direct next-of-kin of the victim, they are not precluded from inheriting.[98]

More difficult are the cases where the effect of the killing is not the acquisition of property by the killer, but an increase in the value of an existing property interest already held by the killer. This situation occurs where one joint tenant kills another. In such a case, the problem is to apply the public policy rule in a manner consistent with the essential nature of a joint tenancy.

Where property is held in joint tenancy, each joint tenant owns the whole of the property, subject to the same right of ownership in her co-tenant, and each has a right of survivorship, entitling one joint tenant to ownership of the entire interest on the death of the other. If the right of survivorship were to be held inoperative, this would in effect work a forfeiture, insofar as the killer would be deprived of a right born out of the creation of the joint tenancy. Yet to allow the killer to take full advantage of the right of survivorship would be to ignore the public policy rule. In Ontario, courts have solved this problem by holding that, where a joint tenant kills his co-tenant, the former takes the full interest in the property, but holds the property as constructive trustee with the beneficial interest held in trust, half for himself and half for the person or persons entitled to inherit from the victim.[99]

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[96] Maddaugh and McCamus, *supra*, note 68, at 491.

[97] *Re Mason*, [1917] 1 W.W.R. 329 (B.C.S.C.) and *Re Dreger* (1976), 12 O.R. (2d) 371, 69 D.L.R. (3d) 47 (H.C.J.). See, also, *Cleaver v. Mutual Reserve Fund Life Ass'n*, *supra*, note 90.

[98] See *Re Dreger*, *supra*, note 97. But see *Re Missirlis*, [1971] 1 O.R. 303, (1970), 15 D.L.R. (3d) 257 (Surr. Ct.).

[99] *Schobelt v. Barber*, [1967] 1 O.R. 349, (1966), 60 D.L.R. (2d) 519 (H.C.J.); *Re Gore*, [1972] 1 O.R. 550, (1971), 23 D.L.R. (3d) 534 (H.C.J.); and *Herring v. Worobel* (1988), 67 O.R. (2d) 151, 31 E.T.R. 290 (H.C.J.).

There is a second situation where the value of the killer's property would increase: where the killer is a remainderman, or one of the remaindermen, and the victim is the life tenant whose death marks the end of the life interest, the killing will accelerate the enjoyment of the killer's interest in the property.[100] Prior to the killing, the remainderman has an existing property interest that should not be subject to forfeiture. However, he should not be allowed to enjoy that interest earlier owing to his part in the death of the life tenant. It would appear that this question has not been considered by the courts.

The law in England differs from that in Ontario in two significant respects. First, the scope of the applicability of the public policy rule is more certain, and has been narrowed. Recent cases have held that, in determining whether the rule should apply, courts should differentiate among criminal acts, and that a conviction for manslaughter will not necessarily require the application of the rule.[101] Courts have accepted that the appropriate test is whether the killer has been "guilty of deliberate, intentional and unlawful violence or threats of violence".[102]

The second major distinction was effected by the *Forfeiture Act 1982*,[103] which allows a court to provide relief from the "forfeiture rule" in cases of unlawful killing, except for murder,[104] where it is required by "the justice of the case".[105] In the Act, "forfeiture rule" is defined as "the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing".[106] Where a court determines that the rule applies to preclude a person who has unlawfully killed another from acquiring an interest in property, the court has power to make an order modifying the effect of the rule. However, such an order cannot be made unless the court "is satisfied that, having regard to the conduct of the [killer] and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case".[107]

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[100] Youdan, *supra*, note 91, at 250-51.

[101] See *R. v. Chief National Insurance Commissioner*; [1981] Q.B. 758, [1981] 1 All E.R. 769, and *Re K (deceased)*, [1985] Ch. 85, [1985] 1 All E.R. 403, aff'd [1986] Ch. 180, [1985] 2 All E.R. 833 (C.A.).

[102] *Gray v. Barr*, [1970] 2 Q.B. 626, at 640, [1970] 2 All E.R. 702, at 710.

[103] *Supra*, note 88. The impact of the legislation is illustrated by *Re K (deceased)*, *supra*, note 100. See, also, *Re Royse*, [1985] Ch. 22, [1984] 3 All E.R. 339 (C.A.).

[104] Section 5 provides that relief from the application of the rule is excluded where a person "stands convicted of murder".

[105] *Forfeiture Act 1982*, *supra*, note 88, s. 2(2).

[106] *Ibid.*, s. 1(1).

[107] *Ibid.*, s. 2(2).

We are of the view that the public policy rule is in need of reform. The ambit of the rule is uncertain. More seriously, if it were given its widest interpretation and were applicable to all crimes, the rule would disregard intention and the extent of moral blame involved in the killer's conduct. Such a rule is capable of working an injustice in individual cases. It would show the civil law to be incapable of responding with flexibility to the circumstances of individual cases. By contrast, in its application of sanctions, the criminal law takes account of relative degrees of moral blameworthiness in the same situations. Even in a narrower formulation that would involve the wrongdoer acting with intention to cause harm to his victim, there may be circumstances where the denial of benefits would be unjust.[108]

The potential for injustice inherent in a widely-cast public policy rule is well illustrated by the 1985 case of *Re Ontario Municipal Employees Retirement Board and Young*.[109] Following the decision of the Supreme Court of Canada in *Lundy v. Lundy*, the court applied the rule to deny pension benefits to a widow who had pleaded guilty to criminal negligence causing the death of her husband. She had consumed a large amount of alcohol and had a motor vehicle accident. There had been no intention on her part to harm her husband; he was very ill and would have died shortly thereafter. Following her conviction, she was given a suspended sentence of three years with probation.[110]

The answer, in our view, is to adopt the general approach taken in the English *Forfeiture Act 1982*, and enact legislation giving the court power to provide relief, in whole or in part, from the effects of the public policy rule. We do not consider it prudent for legislation to attempt to delineate all the situations where the public policy rule will apply. This would prove to be an onerous exercise that, in the end, might result in the inadvertent omission of circumstances that should be comprehended. It would be preferable for the legislation, like the *Forfeiture Act 1982*,[111] simply to set out generally that it is to govern situations where the public policy rule applies, leaving it to the courts to continue to develop the substance of the rule. In exercising their authority to provide relief from the effects of the public policy rule, we would expect that courts would consider factors such as those identified in the English Act, that is, the conduct of both the offender and the victim and "such other circumstances as appear to the court to be material".[112]

We therefore recommend that legislation should be enacted providing that, where the court would otherwise apply the rule of public policy precluding a person who has unlawfully caused the death of another from benefiting

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[108] See, for example, *Re K (deceased)*, *supra*, note 101.

[109] *Supra*, note 93. For discussion, see Youdan, "Annotation: Preventing the Acquisition of Property by Killing—Recent Developments" (1986), 21 E.T.R. 2.

[110] For another example of a harsh result, see *Whitelaw v. Wilson*, [1934] O.R. 415 (H.C.J.).

[111] For the definition of "forfeiture rule", see text at note 106, *supra*.

[112] *Supra*, note 88, s. 2(2).

by his act, the court may order that the effect of the rule be modified, in whole or in part, where it is just to do so. However, the court should not be able to grant relief from the consequences of the rule where the killer has been convicted of murder under the *Criminal Code*.

One further matter that, in our view, warrants attention is the disposition of the property that the killer would have inherited, but for his criminal conduct. Although the courts have settled aspects of this question—the treatment of a joint tenancy and insurance proceeds—lacunae remain. One uncertain area is the effect of the killing of a life tenant by a person entitled to an interest in the remainder. A second matter that should be clarified is the treatment of a joint bank account.

With respect to joint bank accounts, we see no reason why the general approach that is taken to joint tenancy should not apply. Accordingly, we recommend that, where, in the case of a joint bank account, one joint tenant has killed another, and the court has applied the public policy rule, the joint tenant who has unlawfully caused the death should hold the whole bank account as constructive trustee, with his beneficial interest held in trust for himself and the beneficial interest of the victim held in trust for the persons entitled to share in the estate of the victim. We further recommend that there should be a *prima facie* presumption that the beneficial interests are equal.[113]

The problem of a remainderman who has unlawfully caused the death of a life tenant is complex. On the one hand, the remainderman has an interest in the property—a vested future interest—and he cannot be deprived of that interest. On the other hand, by killing the life tenant, he has accelerated the enjoyment of that interest, which formerly had to await the death of the life tenant. Clearly, he should not be allowed to benefit by his act. The measure of the wrongdoer's gain is the period that the life tenant would have enjoyed the property, had she not been killed. It has therefore been suggested that the remainderman should not be permitted to have the benefit for the property for the period that the life tenant would have been expected to live.

We have borrowed a solution from other commentators.[114] We recommend that, where a remainderman has unlawfully caused the death of a life tenant, and the court has applied the public policy rule, the person who has caused the death should hold on constructive trust for the estate of the life tenant an interest in the property for a period of time equivalent to the victim's projected life span, calculated according to generally accepted actuarial principles.

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[113] For a comparable rule, see *Family Law Act, 1986*, S.O. 1986, c. 4, s. 14.

[114] Goff and Jones, *The Law of Restitution* (3d. ed., 1986), at 630. After the deceased's projected life span, the property would pass to the person who has caused the death or his estate. For a discussion, see Maddaugh and McCamus, *supra*, note 68, at 491.

The final situation that should be addressed is where a person, wishing to benefit a third party, kills the testator or intestate in full knowledge that the death will benefit the third party. In such a situation, we believe that the court should have the authority to impose a constructive trust upon the interest conferred on the third party. We therefore recommend that, where a court determines that a person has benefited from the death of a deceased in circumstances that would have disentitled any other person who contributed to the death of the deceased from receiving or retaining a proprietary interest arising as a result of the death, the court should be empowered, notwithstanding the absence of wrongdoing on the part of the person benefited, to impose a constructive trust on the benefit so received in favour of the estate of the deceased or such persons whom it considers proper, including the person so benefited.

(e) Lapse

In the course of reviewing the law affecting beneficiaries, we considered the rules relating to lapse. The doctrine of lapse follows from the fundamental principle that succession to property depends upon survivorship. If a donee dies before the testator, a gift by will is said to "lapse". With respect to personalty, the common law rule was that property comprised in a non-residuary gift fell into the residue of the testator's estate and passed under the residuary gift. In the case of realty, the property passed as if there was an intestacy; thus it benefited the heir, not the residuary devisee.

In Ontario, as a result of statute, there is now no distinction in the treatment of realty and personalty. Subject to a contrary intention appearing in the will, the rule governing personalty is applicable to both.[115]

The doctrine of lapse, in our view, is entirely consistent with the common sense expectation that a testator would wish to benefit a living friend or relative rather than the beneficiaries, next-of-kin, or creditors of a deceased friend or relative. The present statutory rule forces a testator who wishes to avoid the normal consequence of lapse to name, or provide for the ascertainment of, an alternative living person or persons to take in substitution for the primary beneficiary. This is a reasonable rule, for it neither promotes litigation nor defeats the wishes of testators.

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[115] *Succession Law Reform Act*, *supra*, note 7, s. 23, provides as follows:

> 23. Except when a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of,
>
> (a) the death of the devisee or donee in the lifetime of the testator; or
>
> (b) the devise or bequest being disclaimed or being contrary to law or otherwise incapable of taking effect,
>
> is included in the residuary devise or bequest, if any, contained in the will.

There is, however, one aspect of the doctrine that we believe should be addressed. One of the exceptions to the doctrine of lapse is the so-called "moral obligation" exception.[116] Where the exception applies, the gift takes effect despite the prior death of the named beneficiary, and the property passes to the estate of that beneficiary. While the ambit of this exception is somewhat uncertain and controversial in England,[117] in Ontario it has been held that "[a] testator has a moral obligation to a beneficiary only when the beneficiary is owed a fixed debt by the testator or a relative of the testator".[118]

We consider this exception to be an unjustifiable anomaly. It has been held to apply where a will has provided for the payment of a statute-barred debt; it has also been applied where the will has directed payment of a debt erased by bankruptcy.[119] In circumstances such as these, we can see no reason why the beneficiaries of the estate of the deceased beneficiary-creditor should receive preferential treatment. They are treated better than the beneficiaries of a deceased beneficiary who is not a creditor. Yet, in both cases, the beneficiaries are volunteers, who have not given value. Indeed, where the moral obligation exception applies, beneficiaries are in a considerably better position than they would have been been in, had the beneficiary-creditor survived the testator. They obtain a present benefit; however, if the deceased beneficiary-creditor had not predeceased the testator, the latter may have dissipated the property in question or simply chosen not to give it to them. We do not think that the fact that the testator owed a debt to the deceased beneficiary justifies placing her beneficiaries in this privileged position.

We therefore recommend that the "moral obligation" exception to the doctrine of lapse should be abolished.

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[116] The other common law exceptions are in the case of joint tenancy and class gifts: see Feeney, *supra*, note 2, Vol. 2, at 137-39.

The most important statutory exception is the so-called "anti-lapse" provision, s. 31 of the *Succession Law Reform Act*, *supra*, note 7, as am. by S.O. 1981, c. 66, sch., item 17. It provides for a substitutional gift where a child, grandchild, brother, or sister of the testator predeceases the testator. For a discussion, see Feeney, *supra*, note 2, Vol. 2, at 142-46.

[117] Ford, "Lapse of Devises and Bequests" (1962), 78 L.Q. Rev. 88, at 88-90, and Youdan, "Annotation—The Doctrine of Lapse: The Ambit and Applicability of the Common Law Exceptions" (1980), 6 E.T.R. 95, at 95-97.

[118] *Re Mackie* (1986), 54 O.R. (2d) 784, at 789, 28 D.L.R. (4th) 571 (H.C.J.). In this situation, explained the court, "the testator intends that the debt must be discharged, whether to the beneficiary or to the beneficiary estate [*sic*], since it is only morally proper to do so" (*ibid.*) See, also, Ford, *supra*, note 117, at 88-89.

[119] Youdan, *supra*, note 117, at 95, and Ford, *supra*, note 117, at 88.

CHAPTER 4

CREDITORS AND OTHER CLAIMANTS

1. INTRODUCTION

Earlier in this report,[1] we indicated that one of the basic trusts upon which the estate trustee holds the estate of the deceased is to pay the debts of the deceased in accordance with the obligations imposed upon him by law and, in the case of a solvent estate, the obligations imposed by the will. In the discussion that followed, we focused on the nature of the duty imposed on the estate trustee. In this chapter, we examine a number of the substantive and procedural issues respecting creditors and their claims. First, we consider the various procedures governing the administration of insolvent estates. We then turn to solvent estates, and consider the order in which the assets are applied in satisfaction of the debts and liabilities of the estate. Also in the context of solvent estates, we address the liability for the payment of debts charged upon specific property. Thereafter we examine the requirement of advertising for creditors, and the procedures available for the processing of claims against the estate. Finally, we discuss certain miscellaneous issues, namely, contingent liabilities, evidence in actions involving estates, bonding of estate trustees, and the availability of the exemptions under the *Execution Act*.[2]

2. INSOLVENT ESTATES

(a) General

The debts and liabilities of an estate must be paid or provided for, in full, before any distribution can be made to the beneficiaries. Where the assets of an estate are not sufficient to satisfy all of the debts and liabilities, the estate is insolvent. In such a case, the essential task of the estate trustee is to resolve the competing claims of creditors for priority of payment. The estate trustee must ensure that any creditors preferred by law are paid in accordance with the proper order of preference. In any particular case, however, the proper order of preference might depend upon the procedural regime adopted for the administration of the insolvent estate. At present, in Ontario, an insolvent estate might be administered in accordance with

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[1] *Supra*, ch. 2, sec. 3(d).

[2] R.S.O. 1980, c. 146.

one of three alternative procedures, namely:[3] (1) pursuant to the provisions of the *Bankruptcy Act;*[4] (2) pursuant to the provisions of the *Trustee Act;*[5] or (3) pursuant to the terms of a judgment for administration, under the rules of court.[6] Each of these alternatives is discussed below.

(b) Procedural Alternatives

(i) Administration Under the *Bankruptcy Act*

a. Present Law

The *Bankruptcy Act* expressly contemplates that the remedies and procedures provided for in the Act will apply in respect of decedents' estates.[7] Thus, as we shall discuss, a decedent's estate might be petitioned into bankruptcy by its creditors,[8] or the personal representative of the estate

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[3] It might be noted that all 3 alternatives are also available in England. See *infra*, notes 7, 45, and 59 (administration in bankruptcy, administration outside of bankruptcy, and administration proceedings, respectively).

[4] R.S.C. 1985, c. B-3.

[5] R.S.O. 1980, c. 512.

[6] O.Reg. 560/84, rr. 65.01, as am. by O.Reg. 711/89, s. 72, and 65.02. Formerly, the rules of court were known as the "Rules of Civil Procedure". This was changed in 1989: *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 160a, as en. by S.O. 1989, c. 55, s. 31.

[7] In addition to the sections of the *Bankruptcy Act* discussed *infra*, this sec., see s. 2, which defines "person" to include "the heirs, executors, administrators or other legal representatives of a person". This extended meaning is incorporated into the definition of the terms "bankrupt", "debtor", and "insolvent person" in s. 2 of the Act.

In England, s. 421(1) of the *Insolvency Act 1986*, 1986, c. 45 (U.K.) provides that "[t]he Lord Chancellor may, by order made with the concurrence of the Secretary of State, provide that such provisions of this Act as may be specified in the order shall apply to the administration of the insolvent estates of deceased persons with such modifications as may be so specified". Section 5 of The Administration of Insolvent Estates of Deceased Persons Order 1986, S.I. 1986/1999, made under the *Insolvency Act 1986*, s. 421, provides that, unless the court otherwise orders, where a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings shall be continued as if he were alive, subject to certain statutory modifications. Moreover, by s. 3 of the Order, certain provisions of the *Insolvency Act 1986* (as modified in the Order) are made to apply to the administration in bankruptcy of the insolvent estates of deceased persons dying before presentation of a bankruptcy petition.

By contrast, in the United States, an insolvent deceased's estate cannot be administered under the Bankruptcy Code, 11 U.S.C. §§ 101-151326. Such estates must be administered under state probate legislation. See, for example, *Re Walters*, 113 B.R. 602 (Bktcy Ct. 1990).

[8] Involuntary bankruptcy is commenced by one or more creditors filing a petition for a receiving order against the debtor: *Bankruptcy Act, supra*, note 4, s. 43(1). The petition must allege that (1) the petitioning creditor or creditors are owed debts by the debtor totalling $1,000; and (2) the debtor has committed an "act of bankruptcy" within the 6 months preceding the filing of the petition: s. 43(1)(a) and (b). As to what constitutes an "act of bankruptcy", see s. 42(1)(a)-(j), in which 10 specific acts are enumerated. Upon the making

might make a voluntary assignment under the Act.[9] Similarly, a proposal might be filed under the Act in respect of an estate of a deceased debtor.[10]

Where a petition for a receiving order has been filed against a debtor before his death, section 43(17) of the Act provides as follows:

> 43.—(17) Where a debtor against whom a petition has been filed dies, the proceedings shall, unless the court otherwise orders, be continued as if he were alive.

Moreover, the Bankruptcy Rules provide that where a petition has been filed against a debtor, and the debtor dies before service of the petition, service may be effected on the debtor's legal personal representative.[11]

While these provisions deal with the filing of a petition before the death of a debtor, the Act also deals with the filing of a petition after the death of a debtor. Section 44(1) provides that "[s]ubject to section 43, a petition for a receiving order may be filed against the estate of a deceased debtor".[12] In these circumstances, once served with the petition, the personal representative is required to hold the assets of the estate for the trustee in bankruptcy, and is personally liable for any payment or transfer out of the estate, except those in respect of funeral or testamentary expenses.[13]

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of a receiving order, s. 43(9) provides that "the court shall appoint a licensed trustee as trustee of the property of the bankrupt". Section 71(2) provides for the automatic vesting of the property of the bankrupt in the trustee named in the receiving order.

[9] Voluntary bankruptcy is commenced by an insolvent person making "an assignment of all his property for the general benefit of his creditors": *Bankruptcy Act, supra*, note 4, s. 49(1). Upon the assignment being filed with an official receiver, s. 71(2) provides for the automatic vesting of the property of the bankrupt in the trustee named in the assignment.

[10] A debtor, either before or after bankruptcy, may make a proposal to her creditors which, if accepted by the required majority of creditors, and if approved by the court, becomes binding on all unsecured creditors: *Bankruptcy Act, supra*, note 4, ss. 50, 54, and 60-62. The term "proposal" is defined in s. 2 of the *Bankruptcy Act,* to include "a proposal for a composition, for an extension of time or for a scheme of arrangement". If the proposal is not accepted by the creditors, or approved by the court, or if the debtor fails to fulfil the terms of the proposal, the debtor is deemed to have made an assignment, that is, there is an automatic bankruptcy: *Bankruptcy Act,* ss. 57(1), 61(2) and (3), and 63(1), (4) and (6).

[11] Bankruptcy Rules, C.R.C. 1978, c. 368, r. 71.

[12] The application of ss. 43-46 of the *Bankruptcy Act, supra*, note 4, is restricted in s. 48:

> 48. Sections 43 to 46 do not apply to individuals engaged solely in fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and who does not on his own account carry on business.

[13] Section 44(2) of the *Bankruptcy Act, supra*, note 4, provides as follows:

> 44.—(2) After service of a petition for a receiving order on the legal personal representative of a deceased debtor, he shall not make payment of any moneys or transfer any property of the deceased debtor, except as required for payment of the

A petition for a receiving order must allege that the debtor has committed an act of bankruptcy within the six months preceding the filing of the petition.[14] Although section 44(1) of the Act provides expressly that a petition for a receiving order may be filed against the estate of a deceased debtor, it does not address the question whether the act of bankruptcy that must be alleged in the petition must have been committed by the debtor before her death or, alternatively, whether the personal representative can commit an act of bankruptcy on behalf of the estate. This issue was considered in *Re Cavicchi*,[15] although prior to the enactment of what is now section 44(1).[16] The most extreme view of the court was expressed by Mr. Justice Mellish, in the following terms:[17]

> But taking the word 'person' as making the word 'debtor' include not only himself but his personal representatives for all purposes is I think going beyond what the Act really means. A debtor and his legal representative are different entities and it is not the part of the Legislature to make them the same or to alter the powers or capacities of the legal representatives of deceased debtors.
>
> The 'debtor' under the Act so far as 'committing' acts of bankruptcy or making an assignment in bankruptcy are concerned is obviously intended to be a person *in esse* as distinguished from his representative after he has ceased to exist, the ultimate effect or object being to have the debtor's own property equitably disposed of and release him from further liability for his debts.

The majority decision, written by Mr. Justice Doull, reached the same result, but without quite so clear a statement of principle.

Assuming the correctness of this decision, the question arises whether the enactment of what is now section 44(1) can be regarded as altering the result. In *Re Gillingham*,[18] Smily J. expressed the view, albeit in *obiter*, that the provisions of the Act, including what is now section 44(1) and the definition of the terms "debtor" and "person",[19] were sufficient to apply to the estate of a deceased debtor, notwithstanding the fact that the act of

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> proper funeral and testamentary expenses, until the petition is disposed of, otherwise, in addition to any penalties to which he may be subject, he is personally liable therefor.

As to the meaning of the term "testamentary expenses", see *infra*, note 31.

[14] *Bankruptcy Act, supra*, note 4, s. 43(1)(b). See, also, the discussion *supra*, note 8.

[15] [1935] 2 D.L.R. 64, 16 C.B.R. 272 (N.S.S.C.) (subsequent references are to [1935] 2 D.L.R.).

[16] The provision was first enacted in 1949 by the *Bankruptcy Act, 1949*, S.C. 1949 (2d Sess.), c. 7, s. 22.

[17] *Re Cavicchi, supra*, note 15, at 65.

[18] [1955] O.W.N. 270, 35 C.B.R. 10 (H.C.J. in Bktcy) (subsequent references are to [1955] O.W.N.).

[19] See *supra*, note 7.

bankruptcy alleged in the petition did not occur until after the death of the debtor.[20] A similar view has been expressed in the following terms:[21]

> In connection with the act of bankruptcy being committed after the death of a deceased debtor, it would seem that the wording of the definition of 'debtor' and 'person' is wide enough to include such an act. If the estate of a deceased person can be petitioned into bankruptcy, it would seem that the act of bankruptcy should be capable of being committed by the executor or administrator of the estate.

Accordingly, it would appear that an insolvent estate might be administered under the *Bankruptcy Act*, at the instance of the creditors, as the result of a petition for a receiving order being filed either before or after the death of the debtor. Moreover, it would appear that the act of bankruptcy, alleged in the petition, might occur either before or, arguably, after the death of the debtor.

We noted earlier that, not only might an insolvent estate be petitioned into bankruptcy by its creditors, but the personal representative of the estate might make a voluntary assignment into bankruptcy.[22] Section 49(1) of the *Bankruptcy Act* provides for this possibility as follows:

> 49.—(1) An insolvent person or, if deceased, his legal personal representative with the leave of the court, may make an assignment of all his property for the general benefit of his creditors.

Moreover, section 49(1) has been applied, by analogy, in connection with the filing of a proposal under the Act.[23] Unlike the sections of the *Bankruptcy Act*, discussed above, which apply expressly in the case of a deceased debtor, section 50(1) of the *Bankruptcy Act* provides simply that a proposal may be made by an insolvent person and a bankrupt.[24] After referring to the definition of the term "person" in section 2 of the Act,[25] and to certain sections of the Act that apply expressly to deceased debtors, it was concluded that "in a proper case, by analogy to s. 26(1) [now section 49(1)], leave can be given by the court to the executors or other legal representatives of a deceased insolvent person to file a proposal before bankruptcy".[26] As we noted earlier, if the proposal is not accepted by the

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[20] *Re Gillingham, supra*, note 18, at 273.

[21] Houlden, *Comment* (1955-56), 35 C.B.R. 13, at 13-14. The author acknowledged, however, referring to *Re Cavicchi, supra*, note 15, that strong support exists for the contrary view.

[22] See the discussion *supra*, note 9.

[23] *Re Piotrowski* (1970), 16 C.B.R. (N.S.) 28 (Ont. S.C. in Bktcy).

[24] See the discussion *supra*, note 10.

[25] See *supra*, note 7.

[26] *Re Piotrowski, supra*, note 23, at 29.

creditors, or not approved by the court, or if the debtor fails to fulfil the terms of the proposal, the debtor will be deemed to have made an assignment.[27]

Whether bankruptcy results from the making of a receiving order or an assignment, the right to payment of all claimants in the bankruptcy will be determined in accordance with the scheme of distribution set out in the Act. The general principle embodied in the Act is equality of distribution. Section 141 provides that "[s]ubject to this Act, all claims proved in a bankruptcy shall be paid rateably". Accordingly, unless the Act itself provides for a different order of priority, all claims rank *pari passu*. Section 136(1), however, identifies ten classes of creditors who are entitled to be paid in the order of priority set out in the section. Section 136(1)(a), which is of particular relevance, provides as follows:[28]

> 136.—(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> (a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal personal representative of the deceased bankrupt;

Reasonable funeral and testamentary expenses, therefore, rank as a first priority in the distribution of an estate of a deceased bankrupt. While the words "deceased bankrupt" might have been thought to render this section applicable only where the debtor dies after bankruptcy,[29] it has been held to apply as well where the debtor dies before bankruptcy, that is, where a receiving order or an assignment is made in respect of an estate of a

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[27] *Supra*, note 10.

[28] In addition to the preferred claim for funeral and testamentary expenses, the other preferred claims set out in s. 136(1) are as follows: the costs of administration of the bankruptcy; the Superintendent of Bankruptcy's levy; wages and other compensation owing for services rendered to the bankrupt; municipal taxes that are not a lien against the real property of the bankrupt; arrears of rent; legal costs of the first seizing creditor; workmen's compensation, unemployment insurance and deductions under the *Income Tax Act*, R.S.C. 1952, c.148, as substantially re-enacted by S.C. 1970-71-72, c. 63; claims for injuries to employees not covered by workmen's compensation legislation; and other claims of the provincial or federal Crown.

[29] See, for example, the following discussion in Canada, *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970) (hereinafter referred to as "Tassé Report"), para. 3.2.068, at 120:

> The reference to a 'deceased bankrupt' can only be to a debtor who has died after he became bankrupt. It cannot refer to a debtor whose estate becomes bankrupt after his death, as the estate cannot be referred to as a 'deceased bankrupt'. This creates the anomalous result that a claim for funeral expenses, which existed as of the date of bankruptcy of an insolvent estate, is not given a priority, while a claim for funeral expenses, which was not even in existence at the date of the bankruptcy of the debtor, ranks as a first priority. Furthermore, this is a strange result since such a claim, having necessarily occurred after the bankruptcy, is not "provable in bankruptcy" and, for that reason, should not normally qualify for a dividend.

deceased debtor.[30] Accordingly, the reasonable funeral and testamentary expenses[31] incurred by the legal personal representative are to be paid out of the estate in priority to all preferred claims, irrespective of whether the debtor dies before or after bankruptcy.

After the preferred claims set out in section 136 have been paid in full, the remainder of the estate is paid to the general creditors, who share rateably.[32]

b. Proposals for Bankruptcy Reform

Any discussion of bankruptcy law in Canada is complicated by the fact that the process of bankruptcy reform, commenced in 1966 with the appointment of the Tassé Committee,[33] is still incomplete. While no fewer than six insolvency bills were introduced in Parliament between 1975 and 1984, all died on the Order Paper.[34] To a large extent, those bills would have enacted most of the substantive recommendations contained in the Tassé Report.[35] For present purposes, the most important of these proposals was the recommendation that "the priority given for funeral and testamentary expenses should be abolished".[36]

In view of the difficulties encountered in the unsuccessful attempts to replace the *Bankruptcy Act* with comprehensive insolvency legislation, it

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[30] *Re Bertram Estate*, [1972] 3 O.R. 903, 30 D.L.R. (3d) 46 (S.C. in Bktcy).

[31] It has been held that the term "testamentary expenses" includes the compensation payable to the administrators of the estate, prior to bankruptcy, as well as compensation for the legal services provided by their solicitors: *ibid.* Presumably this interpretation of "testamentary expenses" would apply as well to s. 44(2) of the Act, reproduced *supra*, note 13.

[32] In the event that all claimants in the bankruptcy are paid in full, any surplus would be returned to the personal representative. Section 144 of the *Bankruptcy Act, supra*, note 4, provides as follows:

> 144. The bankrupt or the legal personal representative of a deceased bankrupt is entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act and of the costs, charges and expenses of the bankruptcy proceedings.

[33] In 1966 the federal government appointed the Tassé Committee "to review and report on the bankruptcy and insolvency legislation of Canada": Tassé Report, *supra*, note 29, para. 0.0.01, at xi.

[34] For a brief chronology, see Morrison, "The Impact of Bankruptcy Preference Rules on Commercial Secured Financing in the United States and Canada", in Springman and Gertner (eds.), *Debtor-Creditor Law*[:] *Practice and Doctrine* (1985) 551, at 557, *n.* 42.

[35] *Supra*, note 29.

[36] *Ibid.*, para. 3.2.069, at 121. The Tassé Report made no other recommendations dealing expressly with deceased debtors. As to the intention to enact this recommendation, see, for example, s. 265(4) of the *Insolvency Act*, Bill C-17, 1983-84 (32nd Parl., 2d Sess.), which would not have included creditors in respect of funeral and testamentary expenses in the definition of "preferred creditors".

would appear that the decision has been made simply to amend the existing Act. In 1985, an Advisory Committee on Bankruptcy and Insolvency was established "to examine the bankruptcy system, assess possible reforms and recommend to the Minister amendments to the Act that would make it more flexible and bring it more into line with current conditions".[37] With respect to the priority for funeral and testamentary expenses,[38] the Colter Report differed from the Tassé Report, recommending that the protection in section 136(1)(a) [then section 107(1)(a)] of the *Bankruptcy Act*[39] should be retained.[40] It recommended further, however, that "to avoid the uncertainty of what constitutes 'reasonable expenses' and unnecessary legal actions, the funeral expenses should not exceed in any case $5,000".[41]

The most recent position of the federal government respecting bankruptcy reform has been outlined in a paper issued in June 1988 by Consumer and Corporate Affairs Canada.[42] While this paper proposes that a number of amendments be made to the current *Bankruptcy Act*, it is silent with respect to the current priority accorded to funeral and testamentary expenses.[43] Accordingly, it would appear that the intention to abolish or modify the present priority has been abandoned.

(ii) Administration Under the *Trustee Act*

Section 50(1) of the *Trustee Act*[44] provides, in essence, that, where there is a deficiency of assets, the general creditors of a deceased's estate are to be paid *pari passu*.[45] It has been held that section 50(1) abolishes all priority

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[37] Canada, *Proposed Bankruptcy Act Amendments*[:] *Report of the Advisory Committee on Bankruptcy and Insolvency* (2d ed., 1986) (hereinafter referred to as "Colter Report"), at 18.

[38] The Colter Report, *ibid.*, made no other recommendations dealing expressly with deceased debtors.

[39] Reproduced *supra*, this ch., sec. 2(b)(i)a.

[40] Colter Report, *supra*, note 37, at 80.

[41] *Ibid.*

[42] Consumer and Corporate Affairs Canada, *Proposed Revisions to the Bankruptcy Act* (1988), reproduced in Houlden and Morawetz, *Bankruptcy Law of Canada* (3d ed., 1989), Vol. 1, at ND-2.

[43] Indeed, the paper is silent with respect to the position of deceased debtors generally.

[44] *Supra*, note 5.

[45] Section 50(1) of the *Trustee Act, ibid.*, provides as follows:

> 50.—(1) On the administration of the estate of a deceased person, in the case of a deficiency of assets, debts due to the Crown and to the personal representative of the deceased person, and debts to others, including therein debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as are payable in like order of administration as simple contract debts shall be paid *pari passu* and without any preference or priority of debts of one rank or

among creditors in the administration of an insolvent estate, including the priority otherwise accorded to an execution creditor, and that the *Creditors' Relief Act*[46] has not altered this result.[47] Moreover, as we noted in an earlier chapter,[48] section 50(1) abolishes the personal representative's right to retain out of the assets of the estate in her possession the amount of any debt due to her from the deceased, in preference to all other creditors of equal degree.[49]

Secured creditors, on the other hand, must value their security and, provided the personal representative does not elect to take over the security, may participate in the distribution of the estate to the extent of their unsecured deficiency.[50] The personal representative may elect either to consent to the creditor ranking for the amount of her unsecured deficiency or, alternatively, to require an assignment of the security at the value specified by the creditor, in which case the creditor may rank for the remainder of her claim.[51]

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nature over those of another; but nothing herein prejudices any lien existing during the lifetime of the debtor on any of his property.

Legislation similarly premised upon a deficiency of assets, and providing for the payment of creditors on a *pari passu* basis, exists elsewhere in Canada. See, for example, *The Trustee Act*, R.S.S. 1978, c. T23, s. 74; *The Trustee Act*, R.S.M. 1987, c. T160, s. 63(1); *Administration of Estates Act*, R.S.A. 1980, c. A-1, s. 43(1); *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 19, reproduced *infra*, note 108; and *Probate Court Act*, S.N.B. 1982, c. P-17.1, s. 64, reproduced, in part, *infra*, note 108.

In England, insolvent estates might also be administered outside of bankruptcy. Section 4(1) of The Administration of Insolvent Estates of Deceased Persons Order 1986, *supra*, note 7, provides as follows:

> 4.—(1) Where the estate of a deceased person is insolvent and is being administered otherwise than in bankruptcy, subject to paragraphs (2) and (3) below, the same provisions as may be in force for the time being under the law of bankruptcy with respect to the assets of individuals adjudged bankrupt shall apply to the administration of the estate with respect to the respective rights of secured and unsecured creditors, to debts and liabilities provable, to the valuation of future and contingent liabilities and to the priorities of debts and other payments.

The exceptions, set out in s. 4(2) and (3) of the Order, are (1) that "[t]he reasonable funeral, testamentary and administration expenses have priority over the preferential debts listed in Schedule 6 to the Act", and (2) the requirement in s. 292(2) of the Act that a trustee of a bankrupt estate must be a qualified insolvency practitioner does not apply.

[46] R.S.O. 1980, c. 103.

[47] *Re Williamson* (1917), 39 O.L.R. 413, 36 D.L.R. 783 (H.C. Div.).

[48] *Supra*, ch. 2, sec. 3(d).

[49] See Baker, *Widdifield on Executors' Accounts* (5th ed., 1967) (hereinafter referred to as "Widdifield"), at 85.

[50] *Trustee Act, supra*, note 5, ss. 57-58.

[51] *Ibid.*, s. 57(2). "This effectively prevents the creditor from alleging an unreasonably low value for his security, and by so doing increase his claim for the balance. Too high a valuation is not a problem since it could only prejudice the secured creditor to the benefit of the estate": Widdifield, *supra*, note 49, at 83.

Notwithstanding the general rule of equality of distribution embodied in section 50(1), it would appear that funeral expenses, testamentary expenses, and the costs of administration, continue to be entitled to priority.[52] The existence and nature of that priority have been described as follows:[53]

> Although priority among creditors has been abolished because the deceased must be decently and properly buried, and because the executor or administrator is personally liable for the costs of and incidental to the proper administration of the estate, these expenses are a first charge upon the moneys coming to the hands of the personal representative. 'It appears to me,' said Jessel M.R., 'that the executor is liable to pay the funeral expenses, even without an order on his part, if he has any assets available for the purpose; and it has also been decided that the funeral expenses are a first charge on the assets': *Sharp v. Lush*. . . .
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> Testamentary expenses and the costs of administration are the next charges on the assets of the estate. . . . Costs of administration include whatever sum is allowed to an executor or administrator for his care, pains and trouble and time in and about the estate.

Finally, it should be noted that section 59 of the *Trustee Act*[54] provides for the appointment of inspectors, as follows:

> 59.—(1) Where in the administration of the estate of a deceased person the personal representative fears that there may be a deficiency of assets or that all the creditors will not be paid in full, the personal representative may call a meeting of creditors and lay before them the situation of the estate and at such meeting inspectors may be appointed by the creditors to assist the personal representative in the administration of the estate and to advise him with respect thereto.
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> (2) In any such case the personal representative shall call a meeting of creditors for the purpose aforesaid at the request in writing of creditors holding 10 per cent of the amount of claims filed against the estate.
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> (3) In cases where no meeting of creditors has been held, the personal representative may appoint a creditor or creditors as inspector or inspectors to assist him in the realizing and management of the estate but in such case the appointment shall be approved by the surrogate judge[55] before the inspectors accept office.

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[52] The funeral expenses, however, must be reasonable having regard to the circumstances. See *Hutzal v. Hutzal*, [1942] 2 W.W.R. 492 (Sask. K.B.).

[53] Widdifield, *supra*, note 49, at 82.

[54] *Supra*, note 5.

[55] Sections 160 and 160a of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, as en. by S.O. 1989, c. 55, s. 31, contain no equivalent terminology for the phrase "surrogate judge". It is unclear whether this reference will be to the "judge of the Ontario Court (General Division)", or simply to the "judge".

The appointment of inspectors under the Act is permissive.[56] Unless initiative is taken by either the creditors or the personal representative, or, if the court fails to approve the appointment when required to do so, an insolvent estate will be administered without inspectors.[57]

Although section 59 provides three procedural mechanisms for the appointment of inspectors, the duties of the inspectors, once appointed, are somewhat less well defined. The only explicit requirement in the Act is that, in making the election referred to above respecting the valuation of security held by secured creditors, the personal representative must act under the direction of the inspectors.[58] Beyond this requirement, section 59 provides simply that the inspectors are "to assist" and "to advise" the personal representative in the administration.

(iii) Proceedings For Administration

Under the rules of court, proceedings may be brought by a creditor, beneficiary, or personal representative of an estate of a deceased person, for administration of the estate by the court.[59] The granting of a judgment for administration, however, is a matter within the discretion of the court.[60] The rules provide that "[a] judgment for administration of an estate . . . shall be granted only if the judge is satisfied that the questions between the parties cannot otherwise be properly determined".[61]

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[56] See Widdifield, *supra*, note 49, at 83.

[57] The advantages and disadvantages of appointing inspectors have been described, *ibid.*, as follows:

> The advantage of having inspectors is that they protect the trustee against an attack by a dissatisfied creditor, and they are undoubtedly useful in this way where the trustees' decisions could be contentious.
>
> The disadvantage of the inspectors is that they have to be paid, and that working with them will often complicate the administration.

[58] *Trustee Act, supra*, note 5, s. 57(3).

[59] Rules of court, *supra*, note 6, r. 65.01(1), as am. by O.Reg. 711/89, s. 72.

Administration actions are also provided for under the English Rules of the Supreme Court. See R.S.C. 1965, Ord. 85, r. 1 of which defines "administration action" to mean "an action for the administration under the direction of the Court of the estate of a deceased person or for the execution under the direction of the Court of a trust".

[60] See, for example, *Re Sievert* (1921), 51 O.L.R. 305, 67 D.L.R. 199 (App. Div.), and *Re Porter* (1917), 11 O.W.N. 363 (H.C. Div.).

[61] Rules of court, *supra*, note 6, r. 65.01(2). Instead of granting a judgment for administration of the estate, the judge may order that the personal representative render a statement of accounts to the applicant, where no accounts or insufficient accounts have been rendered by the personal representative. See *ibid.*, r. 65.01(3).

It would appear that, in the exercise of this discretion, where the proceeding is brought by a creditor or beneficiary, the courts are reluctant to interfere with the administration of the estate by the personal representative, unless there is some indication of incompetency or bad faith on her part.[62] Similarly, where the proceeding is brought by the personal representative, the court will grant a judgment for administration only where there is a "substantial reason" for the application;[63] the personal representative must show "some special circumstances requiring the intervention of the Court".[64] For example, an order for administration was granted where there had been repeated and protracted litigation respecting the construction of the will and the distribution of the estate, and where it was desirable, in view of all the circumstances, that the estate should be administered by the court.[65]

Where a judgment for administration is granted, it will direct a reference.[66] The referee is given the "power to deal with the property of the estate . . . including power to give all necessary directions for its realization", and is required to "finally wind up all matters connected with the estate . . . without any further directions, except where the special circumstances of the case require interim reports or interlocutory orders".[67] Specific authorization is given in the rules for the referee to publish advertisements for creditors or beneficiaries of the estate, for the filing and examination of claims, and for the adjudication of contested claims.[68] When the hearing of the reference is completed, the referee must prepare a report containing her findings and conclusions.[69] The report is of no effect, however, until it is confirmed.[70] Where the judgment directing the reference requires the referee to report back, the report may be confirmed only upon a motion, ordinarily before the judge who directed the reference.[71] However, where the judgment directing the reference does not require the referee to report back, the report will be confirmed automatically upon the expiration of

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[62] *Re McCully* (1911), 23 O.L.R. 156 (H.C. Div.).

[63] *Re Cronan* (1916), 10 O.W.N. 300 (H.C. Div.), at 301.

[64] *Re Champagne* (1904), 7 O.L.R. 537 (H.C.J.), at 539.

[65] *Kennedy v. Kennedy* (1913), 28 O.L.R. 1, 11 D.L.R. 328 (App. Div.), aff'g (1912), 26 O.L.R. 105, 3 D.L.R. 536 (H.C.J.), aff'd [1914] A.C. 215, 13 D.L.R. 707 (P.C.).

[66] See rules of court, *supra*, note 6, r. 65.02(1). See, also, Form 65A prescribed under the rules.

[67] Rules of court, *supra*, note 6, r. 65.02(1).

[68] *Ibid.*, r. 55.03.

[69] *Ibid.*, r. 54.06. See, also, r. 55.02(22), and Form 55C, the prescribed form of the report in an administration proceeding.

[70] *Ibid.*, r. 54.07.

[71] *Ibid.*, r. 54.08, as am. by O. Reg. 323/86, s. 1.

fifteen days from the date the report is filed, unless, within that time, a notice of motion to oppose confirmation is served.[72]

Although wide powers are given to the referee to wind up all matters connected with the estate, a further appearance before the court is necessary. All moneys realized from the estate must be paid into court, and these funds may be distributed or paid out only by order of a judge.[73] Finally, it should be noted that where there is a deficiency of assets, section 50(1) of the *Trustee Act*,[74] requires that, when the funds are paid out, the ordinary creditors of the estate must be paid rateably.[75]

(c) Conclusions and Recommendations

Determination of the appropriate procedure for the administration of insolvent decedents' estates is complicated by the fact that section 91(21) of the *Constitution Act, 1867* assigns to the Parliament of Canada exclusive jurisdiction in relation to matters of "Bankruptcy and Insolvency". Since the provisions of the *Trustee Act*, discussed above, are premised on a deficiency of assets—that is, insolvency—a question arises concerning the extent of provincial competence to deal with insolvent estates. Presumably, however, when required to resolve this constitutional issue, the courts will adopt the approach described by Madam Justice Wilson in *Re Deloitte, Haskins & Sells Ltd. and Workers' Compensation Board*:[76]

> [T]he trend of the more recent authorities favours a restrictive approach to the concept of 'conflict' and a construction of impugned provincial legislation, where this is possible, so as to avoid operational conflict with valid federal legislation. Where this is done both provisions can stand and have their own legitimate spheres of operation.

Although provincial legislation respecting the administration of insolvent decedents' estates might be vulnerable to constitutional challenge, we recommend that the present parallel systems providing for the administration of such estates should be retained. We recommend below that the court should be given the discretion to dismiss or annul bankruptcy proceedings if, in its opinion, alternative means for the administration of the estate would be more efficient, or less expensive.

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[72] *Ibid.*, r. 54.09(1). A party seeking confirmation before the expiration of 15 days may bring a motion for confirmation before a judge. See *ibid.*, r. 54.09(4)

[73] *Ibid.*, r. 65.02(3).

[74] Reproduced *supra*, note 45.

[75] Section 50(1) of the *Trustee Act* applies to an administration by the court as well as an administration by the personal representative. See *Bank of British North America v. Mallory* (1870), 17 Gr. 102 (Ch.).

[76] [1985] 1 S.C.R. 785, at 808, 19 D.L.R. (4th) 577, at 594.

As a consequence of their familiarity with the *Trustee Act*,[77] certain estates practitioners might prefer to administer insolvent estates under the provisions of that Act. To some extent, however, such a preference might also be a function of the fact that, in a variety of respects, the *Bankruptcy Act* has failed to provide adequately for the specialized requirements of estates administration.[78] Bankruptcy proceedings are also perceived as being complex, expensive, and not particularly well suited to the quick and efficient administration of estates of deceased persons.[79] Retention of the parallel systems, in our view, would respond to the needs of both the ordinary estate, which could be administered relatively quickly and inexpensively under the provisions of the *Trustee Act*, and the more complicated estate, which might require the resolution of numerous complex commercial matters, and for which the *Bankruptcy Act* might be better suited.

We now turn to consider each of the procedures that, under our proposals, would be available for the administration of insolvent decedents' estates in Ontario, and we make a number of recommendations for their reform.

Earlier in this chapter[80] we noted that the *Bankruptcy Act* applies generally to the estates of deceased persons. However, it makes only sporadic reference to the specific context of decedents' estates. Since fundamental reform of the *Bankruptcy Act* has been contemplated for some time, it might be appropriate for the Parliament of Canada to consider the inclusion of provisions directed at the unique problems associated with the administration of insolvent decedents' estates. Indeed, there are a number of difficulties and *lacunae* that perhaps ought to be addressed expressly in the Act. In general, these arise from the fact that the primary focus of the statute is the administration of estates of living persons. Several examples follow.[81]

First, the *Bankruptcy Act* fails to address the question whether, and to what extent, a distinction ought to be made between creditors of the deceased, on the one hand, and creditors of the personal representative, acting in a representative capacity, on the other. Debts might be incurred by the personal representative, on behalf of the estate, for a variety of

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[77] *Supra*, note 5.

[78] The shortcomings of the *Bankruptcy Act, supra*, note 4, in this context are discussed briefly *infra*, this sec.

[79] See, for example, *Re Gillingham, supra*, note 18, at 272, where a petition for a receiving order was dismissed, leaving the estate to be administered by the executrix under the provisions of the *Trustee Act*, to avoid "putting the estate to the expense of bankruptcy proceedings".

[80] *Supra*, this ch., sec. 2(b)(i)a.

[81] The following discussion is derived, in large part, from Wellman, "Bankruptcy Proceedings For Insolvent Decedents' Estates" (1973), 6 U. Mich. J.L. Ref. 552. While this article refers to the U.S. Bankruptcy Code, *supra*, note 7, similar considerations arise in the Canadian context.

reasons, including running a business authorized by the deceased, funeral expenses, probate fees, and other expenses of administration.

Second, since a decedent's estate might be at any stage of administration when it is sought to invoke the provisions of the *Bankruptcy Act*—from prior to appointment of a personal representative, to essentially fully administered—consideration might be given to the inclusion of a limitation period, after which bankruptcy proceedings would not be permitted in respect of an estate of a deceased person. Ideally, such a limitation period would seek to achieve a balance between "the need of creditors for a decent opportunity after learning of their debtor's death to discover facts and plan strategies designed to minimize their losses" and "the legitimate concerns of those who are interested in an early end to questions about the decedent's affairs".[82]

Third, it might be appropriate to consider the relationship between the *Bankruptcy Act* and the summary claims procedure recommended later in this report.[83] For example, it might be desirable to resolve, as a matter of principle, whether creditors who are precluded from asserting their claims for failure to notify the estate trustee within the appropriate time limit should be permitted nevertheless to commence or participate in subsequent bankruptcy proceedings.

Fourth, in view of the proposals to abolish or restrict the priority granted in the *Bankruptcy Act* for funeral and testamentary expenses,[84] it might be useful to seek a *rapprochement* between the federal and provincial philosophies on priorities.

Fifth, a difficult issue arises in connection with the determination of the property of the bankrupt.[85] A number of devices are routinely employed

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[82] *Ibid.*, at 568.

[83] See *infra*, this ch., sec. 4(d).

[84] *Bankruptcy Act, supra,* note 4, s. 136(1)(a). The proposals for such reform are discussed *supra*, this ch., sec. 2(b)(i)b.

[85] Section 67 of the *Bankruptcy Act, supra*, note 4, defines the property of a bankrupt divisible among his creditors, as follows:

> 67. The property of a bankrupt divisible among his creditors shall not comprise
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> (a) property held by the bankrupt in trust for any other person,
>
> (b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,
>
> but it shall comprise
>
> (c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
>
> (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

by debtors to prevent assets from forming part of their estate upon death. For example, property held by a debtor in joint tenancy with another does not vest in his personal representative,[86] but rather passes to the surviving joint tenant by right of survivorship. While the bankruptcy estate of a living debtor would include the debtor's interest in jointly held property, the bankruptcy estate of the estate of a deceased debtor would not include the decedent's interest in such property.[87] Similarly, while the bankruptcy estate of a living debtor would include a power in respect of property that might be exercised by the bankrupt for his own benefit,[88] where the debtor has been given a general power of appointment that terminates on death, the debtor's death ends both his, and his trustee in bankruptcy's, ability to exercise the power.[89] The existence of such discrepancies suggests that it might be desirable to consider, as a matter of principle, whether any "sufficient reason appears why property that a debtor might have made his own as of a moment before his death, and so a part of his estate, should not be included in his estate for bankruptcy purposes".[90]

Finally, while section 44(1) of the *Bankruptcy Act* provides expressly that a petition for a receiving order may be filed against the estate of a deceased debtor, we indicated above[91] that it fails to address the question whether the act of bankruptcy, which must be alleged in the petition, must have been committed by the debtor before her death, or whether the personal representative could commit an act of bankruptcy on behalf of the estate.

In view of these difficulties, the Commission recommends that representations should be made to the Government of Canada to review the

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[86] Section 2(1) and (2) of the *Estates Administration Act*, R.S.O. 1980, c. 143, provides as follows:

> 2.—(1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on his death, whether testate or intestate and notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of his debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.
>
> (2) This section applies to property over which a person executes by will a general power of appointment as if it were property vested in him.

[87] In the case of a living debtor, bankruptcy operates as a severance of a joint tenancy, vesting the debtor's interest in the trustee for the benefit of creditors. See *Re White* (1928), 8 C.B.R. 544 (Ont. S.C. in Bktcy), and *Re Chisick* (1967), 62 D.L.R. (2d) 319, 60 W.W.R. 432 (Man. Q.B.), aff'd (1967), 66 D.L.R. (2d) 543, 62 W.W.R. 586 (Man. C.A.). By contrast, in the case of a deceased debtor, the debtor's death ends the ability to sever a joint tenancy.

[88] *Bankruptcy Act*, s. 67(d), reproduced *supra*, note 85.

[89] *Nichols to Nixcy* (1885), 29 Ch.D. 1005.

[90] Wellman, *supra*, note 81, at 589.

[91] See *supra*, this ch., sec. 2(b)(i)a.

Bankruptcy Act from the perspective of estate administration, to ensure its utility in estate administration procedures.

Section 43(7) of the *Bankruptcy Act* provides the court with the discretion to dismiss a petition for a receiving order where it is satisfied that "for . . . sufficient cause no order ought to be made". This discretion has been used to dismiss a petition where the court was of the opinion that it would not be to the advantage of the creditors of a deceased's estate to make the order, since the assets could be distributed among the creditors of the deceased more economically and expeditiously by leaving the estate in the hands of the executrix.[92] Moreover, section 181(1) of the *Bankruptcy Act* provides that "[w]here, in the opinion of the court, a receiving order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy". It is not clear whether the discretion contained in section 181(1) would be exercised to annul a bankruptcy where the court is of the opinion that the assets could be distributed more economically and expeditiously by leaving the estate in the hands of the estate trustee. It has been held that an insolvent person has a right to make an assignment under the Act, and that an assignment will not be annulled "even if there is an ulterior purpose, provided there is no fraud on the creditors and no abuse of the process".[93] However, it has been further held that where the effect of an assignment would be of no benefit to the bankrupt, and would be detrimental to the only creditor who would receive any distribution from the estate, the assignment ought not to have been filed as it constituted an abuse of process.[94] If, as we proposed above, the current parallel systems providing for the administration of estates of deceased persons are retained, it might be desirable if the *Bankruptcy Act* dealt explicitly with the court's discretion in the context of decedents' estates. Accordingly, the Commission recommends that representations should be made to the Government of Canada to amend the *Bankruptcy Act* to provide explicit discretion to the bankruptcy judge to dismiss a petition for a receiving order, or annul a bankruptcy, if, in her opinion, alternative legislation for the administration of the estate would provide a more efficient or less expensive procedure.

The Commission now turns to consider certain recommendations in connection with the *Trustee Act*. We have already acknowledged the potential vulnerability to constitutional challenge of the *Trustee Act* provisions respecting insolvent decedents' estates, and we have recommended nevertheless that the present parallel systems providing for the administration of such estates should be retained.[95] In our view, the risk that the *Trustee Act* provisions might be held to be unconstitutional would be reduced substantially by ensuring that the scheme of priorities established in the Act is, to

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[92] *Re Gillingham, supra*, note 18.

[93] *Re Louis & Peter Co. Ltd.* (1988), 67 C.B.R. (N.S.) 176 (Ont. S.C., in Bktcy), at 178.

[94] *Ibid.*

[95] *Supra*, this sec.

the extent possible, the same as or similar to the scheme of priorities established in the *Bankruptcy Act*. By rationalizing the two legislative schemes there would be no substantive, as opposed to procedural, advantage in utilizing one procedure over the other.

While both the *Trustee Act*[96] and the *Bankruptcy Act*[97] provide for a *pari passu* distribution among creditors, there are fundamental differences between the two schemes. As we noted earlier, the principle of equality of distribution contained in the *Bankruptcy Act*[98] is subject to section 136(1), which identifies ten classes of creditors who are entitled to be paid in the order of priority set out in the section. A review of these preferred creditors,[99] however, discloses that the administration of most decedents' estates would not involve such claims. Accordingly, in our view, the current *Trustee Act* provisions might not be as vulnerable to constitutional challenge as might otherwise be suggested. We recommend, therefore, that, subject to the recommendations made below, the present provisions contained in the *Trustee Act* respecting the administration of insolvent decedent estates should be retained.

Earlier in this chapter, we indicated that section 136(1)(a) of the *Bankruptcy Act* provides priority for "the reasonable funeral and testamentary expenses incurred by the legal personal representative of the deceased bankrupt".[100] With respect to the *Trustee Act*, we indicated that while section 50(1) provides for a rateable distribution only, that section would appear to be subject to the common law priority for funeral expenses, testamentary expenses, and the costs of administration.[101] Unfortunately, the precise meaning of these terms, and their order of priority, are not entirely clear. For example, in a passage quoted above,[102] it was indicated that funeral expenses constitute a first charge on the assets of an estate, while testamentary expenses and the costs of administration are the next charges. The same commentator later defined testamentary expenses to include funeral expenses,[103] and stated that "[t]estamentary expenses are a first charge upon

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[96] *Supra*, note 5, s. 50(1).

[97] *Supra*, note 4, s. 141.

[98] *Ibid.*

[99] See *supra*, note 28.

[100] See *supra*, this ch., sec. 2(b)(i)a. We also noted that, while certain proposals for reform of the *Bankruptcy Act* would have abolished or restricted this priority, the most recent position of the federal government respecting bankruptcy reform would retain the present priority. See *supra*, this ch., sec. 2(b)(i)b.

[101] See *supra*, this ch., sec. 2(b)(ii).

[102] See *supra*, text accompanying note 53.

[103] Testamentary expenses were described in Widdifield, *supra*, note 49, at 116, as follows:

> Testamentary expenses, Administration expenses and Executorship expenses are synonymous terms. 'I cannot distinguish between "executorship expenses" and "testa-

the estate".[104] Moreover, while the personal representative's compensation—that is, the costs of administration[105]—are stated not to be included in testamentary expenses,[106] it would appear that "[t]he compensation to which an executor or administrator is entitled is treated by the Court as a lien or charge upon the estate" and "[t]he compensation is in the same category as any other expenses incurred by him".[107]

We have concluded that, in order to clarify the present law, the *Trustee Act* should be amended to provide expressly that funeral expenses, testamentary expenses, and the costs of administration, have priority. While it might not be possible to provide an exhaustive definition of these terms, we have concluded that, to the extent possible, their meaning should be clarified. Moreover, in our view, the nature of the priority should be clarified, as discussed below.[108]

> mentary expenses". As I understand the words "executorship expenses", they are the expenses incident to the proper performance of the duty of the executor in the same way as testamentary expenses are, neither more nor less.' *Per* Jessel M.R., *Sharp v. Lush* . . .
>
> The term 'executorship expenses' in a will means expenses incident to the proper performance of the duty of an executor, and includes costs incurred by executors in obtaining the advice of solicitors and counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action, whether instituted by the executors themselves, or by the beneficiary, for the administration of the estate; also the testator's funeral expenses; also expenses incurred by the executors for the protection of specific legacies . . . and payments by the executors in discharge of debts falling due from the testator's estate after his death. . . .

[104] *Ibid.*, at 118.

[105] Costs of administration include "whatever sum is allowed to an executor or administrator for his care, pains and trouble and time in and about the estate". See *ibid.*, at 82.

[106] *Ibid.*, at 117.

[107] *Ibid.*, at 339.

[108] A similar approach can be found in a number of jurisdictions. See, for example, s. 64(1) of the New Brunswick *Probate Court Act, supra*, note 45, which provides as follows:

> 64.—(1) The assets of an estate shall be applied in priority of payment as follows:
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> (a) funeral expenses;
>
> (b) probate costs;
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> (c) solicitors' costs;
>
> (d) wages given priority by the *Wage-Earners Protection Act*;
>
> (e) liabilities incurred by a personal representative in respect to the administration of the estate;
>
> (f) commission allowed a personal representative in relation to the administration of the estate.

Similarly, s. 19 of the Prince Edward Island *Probate Act, supra*, note 45, provides:

> 19. If the assets of the estate are insufficient to pay all the debts of the deceased in

The Commission has also considered whether a statutory lien should be granted to secure the claims entitled to priority. In an earlier chapter of this report[109] we indicated that a personal representative, like a trustee, may reimburse herself out of the assets of the estate for all expenses properly incurred in the course of discharging her responsibilities. The personal representative has, for the securing of this right of indemnity, a lien on the assets of the estate.[110] This principle has been partially codified by section 33 of the *Trustee Act*,[111] which provides that a trustee "may reimburse himself or pay or discharge out of the trust property all expenses incurred in or about the execution of his trust or powers".[112]

At present, it is unclear whether the lien on the assets of the estate, securing the personal representative's right of indemnity, would be sufficient to constitute the personal representative a secured creditor in the event of the bankruptcy of the deceased's estate. A similar concern arises in connection with the personal representative's right to compensation,[113] which is also treated as a lien or charge on the estate.[114] The personal representative would be entitled to rank as a secured creditor only if the lien were held to constitute a specific charge on property. If, however, the personal representative's lien were held to be similar in nature to a solicitor's lien, which gives a right merely to retain property, as opposed to a property right in specific

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full, the personal representative shall make payment thereof in the following order

(a) mortgages on real or personal property and liens including judgment and execution liens as against the property on which they severally attach;

(b) funeral expenses in an amount not exceeding $1,500;

(c) expenses of administration or probate, including any allowance to the personal representative;

(d) medical and nursing expenses of last illness but not exceeding the last one month's expenses;

(e) all other debts on an equal footing including the balance of funeral expenses and the balance of medical and nursing expenses (if any).

See, also, s. 4(1) and (2) of the Administration of Insolvent Estates of Deceased Persons Order, *supra*, note 7, discussed *supra*, note 45, and National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, § 3-805.

109 *Supra*, ch. 2, sec. 5(g).

110 Widdifield, *supra*, note 49, at 102.

111 *Supra*, note 5.

112 In an earlier report, the Commission recommended that the revised *Trustee Act* should contain a provision to the effect that trustees may reimburse themselves or pay or discharge out of trust property all expenses incurred in or about the administration of the trust. See Ontario Law Reform Commission, *Report on the Law of Trusts* (1984), Vol. 1, at 248. In an earlier section of this report, we recommended that estate trustees should enjoy this power as well. See *supra*, ch. 2, sec. 5(g).

113 The compensation of personal representatives is discussed *supra*, ch. 2, sec. 5.

114 Widdifield, *supra*, note 49, at 339.

assets,[115] the personal representative would not be entitled to rank as a secured creditor.

We have concluded that a statutory lien should be granted to secure the claims we have proposed should be granted priority. In our view, this would not only clarify the present uncertainty in the law, but it would, to the extent possible, ensure consistency between the provincial scheme of priorities and the scheme of priorities established under the *Bankruptcy Act*, even if the current preference for reasonable funeral and testamentary expenses, contained in section 136(1)(a) of the *Bankruptcy Act,* is ultimately abolished.[116] By constituting the estate trustee or other person who incurs such expenses[117] a secured creditor with respect to those claims, it would ensure that the estate trustee or other person would rank in priority to both ordinary and preferred creditors, irrespective of whether the estate is administered under the *Bankruptcy Act*[118] or the *Trustee Act*. Accordingly, the Commission recommends as follows:

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[115] It has been held that the holder of a solicitor's lien is not a secured creditor in bankruptcy, since the lien gives a right to retain property only, not a power to proceed against specifically charged property. See *Re Alberta Western Wholesale Lumber Ltd.* (1961), 29 D.L.R. (2d) 277, 35 W.W.R. 648 (B.C.S.C.), and *Re Boscher* (1961), 27 D.L.R. (2d) 359, 33 W.W.R. 644 (Alta. S.C. in Bktcy).

[116] The proposals to abolish this priority are discussed *supra*, this ch., sec. 2(b)(i)b.

[117] Earlier in this report we recommended that, as a general rule, the duty of disposal of the body of the deceased should fall upon the estate trustee. However, we further recommended that if no estate trustee has been named in the will or is appointed by the court, or if the estate trustee is unavailable or unwilling to act, the family members should have the duty to dispose of the body of the deceased. See *supra*, ch. 2, sec. 3(a).

[118] As to the ability of provincial enactments to determine who is a secured creditor in bankruptcy, see Hardy, *Crown Priority in Insolvency* (1986), at 23, where it is said:

> A secured creditor is defined in section 2 of the [Bankruptcy] Act to include a person holding one of a number of types of securities against a debtor's property. Because the varieties of securities are not defined separately in the Act, their validity must be determined by reference to other sources. The elements necessary for most security interests in property to be created are defined in provincial enactments. It is clearly within the competence of the provincial legislatures to pass these statutes under the power to regulate 'property and civil rights within the province' granted by subsection 92(13) of the Constitution Act, 1867. Since the effect of subsections 50(6) and (7) [now s. 72(1) and (2)] of the Bankruptcy Act is that the provisions of the Act do not override the application of other substantive laws not in conflict with them, the validity of security interests asserted on the bankruptcy of the debtor is usually determined by the applicable provincial laws.

It should be noted, however, that, to the extent the proposed charges secure reasonable funeral and testamentary expenses, they might be held to be inoperative in bankruptcy, by virtue of the priority accorded to such expenses in s. 136(1)(a) of the *Bankruptcy Act*. The Supreme Court of Canada has held that provincial statutory liens granted to secure claims specifically referred to in s. 136 of the *Bankruptcy Act* will not entitle the holder to rank as a secured creditor; provincial statutory liens cannot defeat the scheme of priorities expressly created in s. 136(1). See *Deputy Minister of Revenue (Quebec) v. Rainville*, [1980] 1 S.C.R. 35, 105 D.L.R. (3d) 270, and *Re Deloitte, Haskins & Sells Ltd. and Workers' Compensation Board, supra*, note 76. As a practical matter, however, the effect of such a result would be insignificant if the priority contained in s. 136(1)(a) is either retained or abolished. In both

(1) expenses for the disposal of the body of the deceased should constitute a charge on the unencumbered portion of the assets of the estate of the deceased, ranking in priority to the charges described in paragraph (2) below, to the extent that such disposal expenses were reasonable in the circumstances. Disposal expenses should include, among other things, funeral expenses, transportation expenses, casket, cemetery charges and a marker.

(2) testamentary expenses and costs of administration should constitute a charge on the unencumbered portion of the assets of the estate of the deceased, to the extent that such expenses are reasonable in the circumstances. Such expenses should include fees associated with the obtaining of an estate trustee certificate, costs incurred in obtaining legal advice as to the administration of the estate, the costs of the estate trustees and other parties in an action for the administration of the estate, expenses incurred for the protection of the property of the estate, payments in discharge of debts falling due after the death of the deceased, and the compensation to which the estate trustee is entitled by virtue of her administration of the estate of the deceased.

Finally, in connection with the *Trustee Act*, we have considered the desirability of retaining the provisions in the Act relating to the appointment of inspectors.[119] We noted earlier that the duties of the inspectors are not well defined in the Act. Moreover, the Act fails to provide for the procedures to govern the deliberations of inspectors, and fails as well to regulate their relationship to the estate trustee. To overcome these problems extensive statutory provisions would be required.[120] As we indicated earlier, the purpose of retaining the provisions contained in the *Trustee Act* was to provide an expeditious and summary procedure for the administration of insolvent decedents' estates. In order to fulfil this objective, it is essential, in our view, that the estate trustee be given a relatively free hand in the management of the estate. We have concluded, therefore, that the creation of complex institutions, such as would be required to provide adequately for the appointment and duties of inspectors, would be counter-productive. Under our proposals creditors would be protected adequately by the ability to have the conduct of the estate trustee reviewed by the court. The sanction that, in most cases, would deter wrongdoing is the personal liability of the estate trustee.[121] It should also be noted that creditors who do insist on further safeguards might be able to obtain the additional protections afforded by

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cases, the holders of such claims would be entitled to priority over all other preferred creditors, in the case of retention, on the basis of the first priority granted in s. 136(1)(a), and in the case of abolishment, on the basis of the statutory charge. The result might be otherwise, however, if the relative priority granted to funeral and testamentary expenses in s. 136(1) is altered, or if the priority is limited in amount.

[119] *Trustee Act, supra*, note 5, ss. 59 and 57(3), discussed *supra*, this ch., sec. 2(b)(ii).

[120] See, for example, ss. 116-20 of the *Bankruptcy Act, supra*, note 4.

[121] The liability of the estate trustee is discussed *supra*, ch. 2, sec. 4.

the *Bankruptcy Act* by petitioning the estate into bankruptcy. Accordingly, the Commission recommends that the institution of inspectors under the *Trustee Act* should be abolished, and that sections 57(3) and 59 of the *Trustee Act* should be repealed. Our conclusion in this respect is buttressed by the understanding that, in practice, inspectors are seldom, if ever, appointed.

The Commission now turns to consider certain recommendations in connection with proceedings for administration of an estate by the court under the rules of court.[122] Although such proceedings are rarely utilized, they may be useful and appropriate in limited circumstances.[123] Moreover, such proceedings are not limited to cases of insolvency. Since proceedings for administration would thus continue to have some residual utility, the Commission recommends that such proceedings should be retained. However, in our view, the multi-step procedure—involving judgment, reference, report, and order for payment out[124]—should be rationalized. We recommend, therefore, that the judge having carriage of the proceeding should have carriage of the whole proceeding, from the application for administration, through all intermediate procedures, to the final distribution of the estate. This proposal, in our view, would promote a greater willingness on the part of estates practitioners and judges to utilize this remedy. Moreover, since the rules of court respecting proceedings for administration are somewhat cryptic, and therefore fail to provide a sufficient indication of the format or procedure of the proceeding, we recommend that the elements of proceedings for administration of an estate by the court should be set out expressly in legislation.

3. SOLVENT ESTATES

(a) Order of Application of Assets in Satisfaction of Debts and Liabilities

In the preceding section we dealt with estates in which the assets were not sufficient to satisfy the debts and liabilities in full. As we discussed, in the case of such insolvent estates, no distribution would be made to the beneficiaries; the contest would be exclusively among the creditors for payment of their claims. In this section we turn to consider solvent estates, that is, estates in which the assets are sufficient to satisfy the claims of creditors in full. In this case, while the creditors would be paid in full, a contest would arise among the beneficiaries to determine which assets of the estate are to be applied in satisfaction of the creditors' claims, and whose claims are to be reduced accordingly.

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[122] *Supra*, note 6.

[123] See, for example, the circumstances described *supra*, text accompanying note 67.

[124] The present procedure in administration proceedings is discussed *supra*, this ch., sec. 2(b)(iii).

As will be seen below, the common law order of application of assets depends, in part, on whether the assets are personalty or realty and on whether the legacy[125] or devise[126] is general or specific.[127] "A specific legacy is a bequest of a specified part of the testator's personal estate which is so distinguished. A general legacy is a bequest of some thing or money, not necessarily part of the estate and not distinguished from all others of the same kind."[128] Reference should also be made to a demonstrative legacy, which is a bequest "given with reference to a particular source from which it is to be met".[129] To the extent that the fund referred to in a demonstrative legacy is sufficient, the legacy ranks as a specific legacy. However, to the extent that the fund is not sufficient, the legacy ranks as a general legacy.

The common law order of application of assets has been set out as follows:[130]

> 1. The general personal estate not bequeathed at all, or by way of residue only.
>
> 2. Real estate devised in trust to pay debts.
>
> 3. Real estate descended to the heir[131] and not charged with the payment of debts.
>
> 4. Real or personal estate charged with the payment of debts, and (as to realty) devised specifically or by way of residue, or suffered, by reason of lapsed devise, to descend; or (as to personalty) specifically bequeathed, subject to that charge.[132]

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125 A legacy, or bequest, is a gift of personalty by will.

126 A devise is a gift of realty by will.

127 It has been suggested that "[s]ome of the rules for distinguishing specific bequests from general or residuary bequests . . . seem to apply to devises, so far as the physical differences between land and chattels will allow": Jarman, *A Treatise on Wills* (8th ed., 1951, by Jennings), Vol. 2, at 936.

128 Sunnucks, Martyn, and Garnett, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (1982), at 894.

129 *Ibid.*

130 Widdifield, *supra*, note 49, at 86.

131 That is, intestate realty.

132 A number of authorities do not include, within this class of assets, personal property specifically bequeathed and charged with the payment of debts. This variation has been explained in Woodman, *Administration of Assets* (2d ed., 1978), at 20-21 in the following terms:

> First . . . if a testator charged a specified fund of personalty, other than residue, with the payment of debts, this was sufficient to discharge the general personalty from its primary liability. . . . Personalty specifically bequeathed and charged with the payment of debts necessarily came within this rule, so that it was the primary fund for the payment of debts; this is inconsistent with a proposition that such property should come within the fourth class.

5. General pecuniary legacies, including annuities and demonstrative legacies which have become general. . . .

6. Specific legacies (including demonstrative legacies that so remain), specific devises and residuary devises not charged with debts, to contribute *pro rata.*

7. Real and personal estate over which the testator had a general power of appointment which has been expressly exercised by deed (in favour of volunteers) or by will.

8. Paraphernalia of the testator's widow.

The traditional rule, embodied in the above order of application of assets, is that personal property—particularly intestate personal property and personal property forming part of the residue—bears the primary burden of satisfying the debts and liabilities of the estate. This rule gives a preferred position to real property and the devisees of real property, even those who take realty upon an intestacy. However, the rule is subject to an expression of contrary intention in the will. The testator, therefore, may designate in her will the order in which her property is to be applied in satisfaction of the claims against her estate. Thus, the order of application of assets is in the nature of a presumption, rebuttable by proof of a contrary intention of the testator.

The above common law order is, of course, subject to statutory modification. In Ontario, the following provisions of the *Estates Administration Act*[133] deal directly with the administration of assets:

2.—(1) All real and personal property that is vested in a person . . . devolves to and becomes vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of his debts and so far as such property is not disposed of . . . it shall be administered, dealt with and distributed as if it were personal property not so disposed of.

Secondly, equity, in its endeavours to make realty available for the payment of debts, readily inferred an intention that debts should be paid out of land, and considered that a general direction for payment of debts was sufficient to bring, within Class 4, all realty whether given specifically or by way of residue . . . and all personalty specifically bequeathed. . . . [A] general direction for the payment of debts thus had the effect of charging specifically bequeathed personalty with the payment of debts so that, logically, the result should have been that such general direction made the personalty specifically bequeathed primarily liable to satisfy debts, to the exoneration of the general personalty. This argument is, of course, contrary to authority . . . but is another explanation of the omission of specifically bequeathed personalty from Class 4 by the learned texts above mentioned.

The solution to the problem appears to be that, where there was a general direction to pay debts, specifically bequeathed personalty was charged with the payment of the debts to the extent of bringing such personalty into the fourth class, but not to the extent of making it primarily liable for payment of the debts.

[133] *Supra*, note 86.

> 4. Subject to the other provisions of this Act, in the administration of the assets of a deceased person, his real property shall be administered in the same manner, subject to the same liability for debts, costs and expenses and with the same incidents as if it were personal property, but nothing in this section alters or affects as respects real or personal property of which the deceased has made a testamentary disposition the order in which real and personal assets are now applicable to the payment of funeral and testamentary expenses, the costs and expenses of administration, debts or legacies, or the liability of real property to be charged with the payment of legacies.
>
> 5. Subject to section 32 of the *Succession Law Reform Act*, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from his will or any codicil thereto, is applicable rateably, according to their respective values, to the payment of his debts, funeral and testamentary expenses and the cost and expenses of administration.

When originally enacted,[134] these sections were thought to remove many of the distinctions between real and personal property in administration.[135] However, as we shall discuss below, not only did they not remove the problems, they compounded them.

As we have seen, in an estate that consists solely of personal property, the burden of debts is borne first by any intestate or residuary property.[136] If intestate property and residuary property are insufficient to pay the estate's debts in full, then, assuming that the testator has not expressed an intention to the contrary, general legacies, including the general portion of demonstrative legacies, will abate first, and specific legacies, including the specific portion of demonstrative legacies, will abate after the general legacies have been exhausted.[137]

In an estate that is composed of both realty and personalty the order of application of assets is somewhat more complicated. It has been noted

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[134] These sections were originally enacted in *The Devolution of Estates Act*. See, for example, *The Devolution of Estates Act*, R.S.O. 1914, c. 119, ss. 3(1), 5, and 6.

[135] See, for example, *Re Reddan* (1886), 12 O.R. 781 (Ch. Div.), at 782.

[136] The usual reason for a partial intestacy is the absence or failure of a residuary clause in a will. Where there is a residuary legacy there will usually be no intestate personalty; the residuary legatee receives only what remains after satisfaction of all debts and non-residuary legacies.

[137] The following illustration may be of assistance. Assume that T makes the following bequests in her will:

(a) To A: my 1985 automobile.
(b) To B: the shares in ABC Co. owned by me at my death.
(c) To C: $4000 out of the proceeds of my Canada Savings Bonds.
(d) To D: $2000.
(e) To E: $1000.
(f) To F: the residue.

above that realty enjoys a favoured position under the common law order. With the exception of intestate realty, which is resorted to before general and specific legacies, personalty is the primary fund for the payment of debts in the absence of an expression of a contrary intention.

In Ontario, for most purposes, the *Estates Administration Act* subjects realty to the same rules as personalty.[138] For the purpose of the payment of debts, section 5 provides that realty and personalty "comprised in a residuary devise or bequest" are applicable rateably. Section 4 provides that realty and personalty "shall be administered in the same manner, subject to the same liability for debts". However, section 4 also contains a proviso that "nothing in this section alters or affects as respects real or personal property of which the deceased has made a testamentary disposition the order in which real and personal assets are now applicable to the payment of . . .

At death, T's estate is as follows:

Assets:

1985 automobile	$ 2,000
ABC Co. shares	$ 2,000
Canada Savings Bonds	$ 3,000
Other Assets	$ 4,000
	$11,000

Liabilities:

(Debts, funeral expenses, taxes and administration expenses)	$ 1,000
Net value of estate	$10,000

In this example, the sum required to satisfy all of T's nonresiduary legacies is $11,000. The net value of the estate is $10,000. Accordingly, there is a $1,000 deficiency. The legacies to A and B are specific, while the legacies to D and E are general. The legacy to C is demonstrative. Since the fund out of which it is payable is insufficient to satisfy the legacy in full, the legacy is treated as specific to the extent of the fund, namely $3,000, and general to the extent of the insufficiency, namely, $1,000.

Therefore, the general legacies total $4,000, and the deficiency totals $1,000. The general legacies must abate rateably, that is, by one quarter. In the result, D receives $1,500, E receives $750, and C receives $3,750 (that is, $750 in respect of the "general" portion of his demonstrative legacy and $3,000 in respect of the "specific" portion of his demonstrative legacy).

Since the general legacies are not exhausted by the obligation to satisfy the debts of the estate, the specific legacies do not abate at all. As noted above, C will receive the "specific" portion of his demonstrative legacy in full.

If the debts of the estate were $5,000 instead of $1,000, the general estate would be exhausted by the debts, and the debts would still not be satisfied in full. In that case, the specific legacies would have to abate rateably. The total deficiency after exhaustion of the general estate would be $1,000. The total value of the specific legacies, including the "specific" portion of the demonstrative legacy, is $7,000. Therefore, each specific legacy would abate by one-seventh.

[138] *Supra*, note 86, ss. 2-7.

debts". The courts have held that the proviso to section 4 preserves for Ontario the common law order of application of assets.[139] The only change to the common law is effected by section 5, which renders real and personal property comprised in a residuary devise or bequest equally liable for the payment of debts. Section 5, moreover, has been interpreted narrowly. It has been held to apply only where both real and personal property is comprised in a single residuary gift.[140] Further, since a "residuary bequest" requires that something be taken out of the personal estate and that the bequest apply only to the balance, it has been held that a gift of "all" the testator's personal estate was not "residuary" within the meaning of section 5.[141]

Where a will contains a residuary clause that disposes of the residue of both real and personal property, section 5 will apply. The first assets to be applied to the payment of debts will be the residuary realty and personalty, which, under section 5, is treated as a single fund. If the residuary realty and personalty is insufficient to pay the debts in full, then the effect of section 5 is spent, the proviso to section 4 applies, and the order of abatement of the general and specific legacies and devises is the common law order. Where a will contains no effective residuary clause, or no residuary clause disposing of both realty and personalty, section 5 will have no application. The proviso to section 4 will apply, and the order of application of assets will be the common law order, set out above.

The unsatisfactory state of the law in this area has been the subject of discussion in a number of jurisdictions. For example, the Queensland Law Reform Commission made the following observations:[142]

> Perhaps the most archaic area of the Queensland Succession laws, and one where it is certainly true to say that Queensland law must be amongst the most archaic in the world, is that part of the law which concerns the payment of debts by executors, where the old common law rules have not been the subject of legislative attention for over a hundred years. A series of rules, which defy analysis and which only a reason tempered by long study of legal history could justify, govern the mode of distribution of assets amongst beneficiaries. A lawyer who attempted to satisfy the average client about the existence, let alone the justification, of some of the existing rules in this respect, would have an unenviable task. Indeed, how could one justify the present rule that if the testator devises *realty* on trust to pay the debts of his estate, nevertheless that realty will not be used for that purpose until all the residuary *personalty* has been exhausted for the payment of debts? Or how could one justify the rule that a devisee of land is protected, as against a pecuniary legatee, from the obligation to pay

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[139] *Re Hopkins Estate* (1900), 32 O.R. 315 (H.C.J., Q.B. Div.), and *Re Swayze*, [1938] O.W.N. 524 (H.C.J.).

[140] *Re Moody Estate* (1906), 12 O.L.R. 10 (H.C.J., C.P. Div.).

[141] *Ibid.*

[142] Queensland Law Reform Commission, *A Report on the Law Relating to Succession*, Q.L.R.C. 22 (1978) (hereinafter referred to as "Queensland Report"), at 1 (emphasis in original).

> debts, whereas, if there happens to be a general direction contained in the will that debts are to be paid, the rule is reversed and the pecuniary legatee is protected as against the devisee?

Further, on the same topic, the Queensland Commission stated:[143]

> The law governing the administration of assets, that is, the rules which prescribe out of whose benefits, left by the will, the debts of the deceased are to be paid, is in a state of unwarranted confusion. There are historical reasons why the rules are as they are, but those reasons are no longer relevant. The principal policy factor which the present rules inherit is the desire of former times that realty devised should not be available for the payment of the debts of the deceased. As the medieval reasons for that rule faded so attempts were made, with increasing success, to bring realty into the creditors' net. The eventual crystallising of the rules . . . left us with many anomalies.

The above comments, in our view, are equally applicable to the present law in Ontario. We have already noted the privileged position accorded to realty under the common law order. While this distinction might have been rational, or purposeful, at one time, it is now an anachronism.[144] Moreover, the continued preference for realty is inconsistent with the apparent intent of Ontario legislation.[145] In addition, we have concluded that the present law in Ontario is unnecessarily complex and productive of considerable uncertainty.

In our view, the common law order of application of assets should be replaced by a simplified order.[146] The Commission recommends, therefore, that, subject to the recommendations made below, the order of application of assets to meet the liabilities of an estate should be as follows:

(a) property specifically charged with the payment of debts or left on trust for the payment of debts;

(b) property passing by way of intestacy;

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[143] *Ibid.*, at 38.

[144] See Law Reform Commission of Western Australia, *Report on the Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Project No. 34, Part VII (1988) (hereinafter referred to as "Western Australia Report"), para. 2.12, at 9-10.

[145] When originally enacted, it was assumed that the effect of ss. 2, 4, and 5 of the *Estates Administration Act, supra*, note 86, was to constitute a single fund, comprising both realty and personalty, out of which debts were to be satisfied. See Widdifield, *supra*, note 49, at 87.

[146] The common law order has been the subject of statutory modification in a number of jurisdictions. See Western Australia Report, *supra*, note 144, paras. 4.2-4.40, at 25-39, for a review and criticism of the statutory orders enacted in England (*Administration of Estates Act 1925*, 15 & 16 Geo. 5, c. 23 (U.K.), s. 34(3), and Sched. 1, Part II), New South Wales (*Wills, Probate and Administration Act, 1898*, No. 13, ss. 46A(1), 46C(2) and Sched. 3, Part II), Victoria (*Administration and Probate Act 1958* (No. 6191), ss. 38-40, and Sched. 2, Part II), and Queensland (*Succession Act 1981*, ss. 29, 55(a), and 59-61).

(c) residuary property;

(d) general legacies and devises;

(e) specific legacies and devises;

(f) property over which the deceased had a general power of appointment that she might have exercised for her own benefit without the assent of any other person, where the property is appointed by will.

The Commission further recommends that, since there is no longer any principled rationale for distinguishing between personalty and realty in the application of assets for the payment of debts, there should be no distinction between personalty and realty in the application of the above order.

Several comments might be made with respect to the above recommendations.[147] The property that, under our proposal, would be applied first in the satisfaction of debts is property specifically charged with the payment of debts or left on trust to pay debts. This category would modify the common law significantly in two respects. First, by combining property specifically charged with the payment of debts and property left on trust to pay debts within a single category, it would eliminate a distinction made at common law that, in our view, cannot be justified in principle.[148] Second, it would make such property applicable to the payment of debts before even intestate property. This, we believe, would better effect the testator's expressed intention.[149] While it might be argued that the first category is not necessary

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[147] In this context, reference should also be made to s. 68 of the *Succession Law Reform Act*, R.S.O. 1980, c. 488, which provides as follows:

> 68.—(1) Subject to subsection (2), the incidence of any provision for support ordered shall fall rateably upon that part of the deceased's estate to which the jurisdiction of the court extends.
>
> (2) The court may order that the provision for support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to the court seems proper.

[148] We agree with the comment made in the Queensland Report, *supra*, note 142, para. 59, at 41, that "we doubt whether any testator would really wish to make a distinction between a trust to pay debts and a charge to pay debts, or would intend, even if he did, that the former should be applicable for the payment of debts before the latter"

[149] This approach has been adopted in Queensland. See the *Succession Act 1981*, s. 59. See, also, the Western Australia Report, *supra*, note 144, paras. 5.7-5.8, at 44-45, which discusses this approach in the following terms:

> 5.7 Except in Queensland, intestate property must be applied first in the payment of debts, unless the will expressly and with unequivocal clarity provides to the contrary. This is on the ostensible ground that a testator's bounty to named beneficiaries will thereby be maximized, and at the expense of those for whom (presumably) he had no particular intention of providing.
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> 5.8 The Queensland approach is very different. It is based on the ground that where a testator has expressly appropriated or charged property with the payment of his debts there is no good reason at all why the law should impose some other rule—

since, as we recommend below, the statutory order should be subject to the expression of a contrary intention in the will, we have concluded, like the Queensland Commission, that it should be retained "both as a statutory expression of the view we take and to provide personal representatives with clear guidance as to the order in which such property should be used. Otherwise the executor would have himself to consider whether a direction or trust to pay debts out of property placed that property in a class of its own and where that class was in relation to the other classes."[150]

It should also be noted that the above recommendation would preserve one of the significant features of the common law order. Under our proposals specific legacies would be applied in the satisfaction of debts and liabilities only after the general legacies have been exhausted. The policy underlying this issue has been described in the following terms:[151]

> The point of policy is whether it is desirable that the law require that the subject-matter of a general legacy (for example, 'I give the sum of $50,000 to X') be applied in the payment of debts before the subject-matter of a specific disposition (for example, 'I give Blackacre to Y'). From these examples it could hardly be said that the testator intended to give the legacy to X any less strongly than the devise to Y.

We have concluded, however, like the Law Reform Commission of Western Australia, that "[o]n balance . . . in many cases general legatees will not in point of fact have been intended to be benefited by a testator quite as strongly as specific beneficiaries: the reverse will not as often be the case, especially in regard to valuable property".[152]

Finally, we note that the last category of property to be applied in satisfaction of debts and liabilities, namely, property over which the deceased had a general power of appointment, where the power is exercised by will, is derived from section 54 of the *Trustee Act*.[153]

> namely, that intestate property be nevertheless applied first. In short, the Queensland approach is to take the testator at his word. Other approaches attempt to answer a theoretical question on behalf of a testator which, because his is dead, he cannot answer for himself. But they do so on the real basis that it is somehow 'better' to maximize benefits to named beneficiaries. At this point, the Queensland rule reflects the reality that takers on partial intestacy are likely to be at least as closely related by blood to the testator as are named beneficiaries, who could be anything from charities to mere acquaintances.
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> For a contrary view, see Woodman, *supra*, note 132, at 161-62.

[150] Queensland Report, *supra*, note 142, para. 59, at 42.

[151] Western Australia Report, *supra*, note 144, para. 5.15, at 46.

[152] *Ibid.*, at 46-47.

[153] Section 54 of the *Trustee Act, supra*, note 5, provides as follows:

> 54. Property over which a deceased person had a general power of appointment, which he might have exercised for his own benefit without the assent of any other person, shall be assets for the payment of his debts where the same is appointed by

The above order, in our view, should be subject to the expression of a contrary intention in the will. To the extent possible, the wishes of the testator regarding the payment of debts and legacies should be effective. "[T]hese matters are so closely associated with the act of testation itself as to be, in reality, inseparable from it."[154] The Commission recommends, therefore, that where a will expresses an order of application of assets other than the one recommended above, effect should be given to the directions in the will.

The simplified order of application of assets recommended above will be sufficient to deal with most cases. However, we acknowledge that, in some cases, a rigid scheme of application might frustrate the wishes of the testator, and work an injustice on some of the beneficiaries.[155] Accordingly, the Commission recommends that the court should have the discretion to direct an order of application of assets, other than the one recommended above, where it is of the opinion that the order of application directed by it more closely approximates the wishes of the testator.[156] This judicial discretion, we believe, would not be used frequently. However, it might be useful in appropriate circumstances, for example, to enable the court to cure cases of hardship in circumstances in which the dependants' relief provisions[157] do not apply.[158]

(b) Specifically Encumbered Property—Locke King's Act

We now turn to consider an issue that is closely related to the order in which assets are applied in satisfaction of debts, namely, the effect of a specific encumbrance held by a creditor on estate property. At common law, secured debts were payable out of the estate in the same manner as other debts. As we discussed above, the primary fund for the payment of debts, at common law, is the intestate and residuary personalty. Consequently, a

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his will, and, under an execution against the personal representatives of such deceased person, such assets may be seized and sold after the deceased person's own property has been exhausted.

154 Western Australia Report, *supra*, note 144, para. 5.2, at 43.

155 See the illustration provided *infra*, note 158.

156 A similar discretion is conferred on the court in the Uniform Probate Code, *supra*, note 108, § 3-902(b), which provides that "[i]f the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator".

157 See, now, Part V of the *Succession Law Reform Act, supra*, note 147.

158 Such a case might arise, for example, where a testator makes a bequest of "my paintings to A, the residue to my wife". Even though the testator might have made adequate provision for the proper support of his wife, if the paintings were to appreciate substantially in value before the death of the testator, the wife, as the residuary legatee, might be burdened with the payment of substantial capital gains tax, attributable to the paintings, quite contrary to the expectations of the testator.

person who became entitled to mortgaged property upon the death of the mortgagor was entitled to have the mortgage discharged out of the general personalty, and thus took the property free of the encumbrance.[159] In the United Kingdom this position was changed, as to realty, by the Real Estate Charges Acts of 1854, 1867 and 1877,[160] referred to collectively as *Locke King's Act*. This legislation provided that, unless a contrary intention is clearly expressed by the testator, where realty is subject to a mortgage at the time of the testator's death, the realty itself is the primary fund for the repayment of the mortgage. Thus, a devisee or heir of mortgaged realty would take the property subject to the mortgage. The rationale underlying this legislation has been described in the following terms:[161]

> The legislation depends partly upon the theory that if, for example, the deceased person had intended his residuary beneficiaries to pay in order to give an unencumbered title to a devisee of mortgaged land, he would have said so expressly. But it appears also to depend upon the policy ground of wealth-equalization.

The relevant legislation in Ontario, also commonly referred to as *Locke King's Act*, is found in section 32 of the *Succession Law Reform Act*,[162] which provides as follows:

> 32.—(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in freehold or leasehold property which, at the time of his death, is subject to a mortgage, and the deceased has not, by will, deed or other document, signified a contrary or other intention,
>
> (a) the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and
>
> (b) every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.
>
> (2) A testator does not signify a contrary or other intention within subsection (1) by,
>
> (a) a general direction for the payment of debts or of all the debts of the testator out of his personal estate, his residuary real or personal estate or his residuary real estate; or

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[159] For a relatively recent application of the common law rule, see *Brumwell v. Caldwell* (1984), 65 N.S.R. (2d) 293, 17 E.T.R. 197 (N.S.S.C., App. Div.).

[160] *Real Estate Charges Act 1854*, 17 & 18 Vict., c. 113 (U.K.); *Real Estate Charges Act 1867*, 30 & 31 Vict., c. 69 (U.K.); and *Real Estate Charges Act 1877*, 40 & 41 Vict., c. 34 (U.K.).

[161] Western Australia Report, *supra*, note 144, para. 3.27, at 18-19.

[162] *Supra*, note 147. Formerly, the provision was contained in s. 37 of *The Wills Act*, R.S.O. 1970, c. 499.

(b) a charge of debts upon that estate,

unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

(3) Nothing in this section affects a right of a person entitled to the mortgage debt to obtain payment or satisfaction either out of the other assets of the deceased or otherwise.

(4) In this section, 'mortgage' includes an equitable mortgage, and any charge whatsoever, whether equitable, statutory or of other nature, including a lien or claim upon freehold or leasehold property for unpaid purchase money, and 'mortgage debt' has a meaning similarly extended.

Perhaps the most obvious deficiency of this section is the fact that it does not apply to personalty.[163] The corresponding legislation in the United Kingdom, by comparison, was extended to personalty in 1925.[164] We have already expressed our view that real and personal property should be assimilated in the application of assets for the payment of debts.[165] We have concluded, therefore, that realty and personalty should be subject to the same rules respecting the satisfaction of encumbrances. Accordingly, we recommend that section 32 of the *Succession Law Reform Act* should be amended to apply to personal, as well as real, property.

In section 32(4), the term "mortgage" is broadly defined to include not only an equitable mortgage or other charge, but also a lien for unpaid purchase money. It is unclear, however, whether a writ of seizure and sale would be treated similarly. Consequently, the Commission considered whether the definition should be extended expressly to include a writ of seizure and sale, which, in a sense, constitutes a charge on realty since it "binds the . . . lands against which it is issued from the time it has been received for execution and recorded by the sheriff".[166] We concluded, however, that, since there is no necessary correlation, in the case of a writ, between the debt and the charge, the underlying rationale of the section would ordinarily be inapplicable. In most cases, there will be no connection between the judgment debt and the "charge" on the realty and, therefore, there is no reason that the realty should be the primary fund for the payment of the judgment debt. Accordingly, the Commission recommends that a writ of seizure and sale should be excluded from the definition in section 32(4)

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[163] See, for example, *Re Simpson* (1927), 60 O.L.R. 310, [1927] 2 D.L.R. 1043 (H.C. Div.), where a specific legatee of an automobile purchased by the testator under a conditional sales contract was entitled to have the unpaid balance of the purchase price paid out of the general assets of the estate.

[164] See s. 35 of the *Administration of Estates Act 1925, supra*, note 146, which refers only to "property", and s. 55(1)(xvii), which defines "property" to include "a thing in action and any interest in real or personal property".

[165] *Supra*, this ch., sec. 3(a).

[166] *Execution Act, supra*, note 2, s. 10(1), as en. by S.O. 1988, c. 37, s. 1(1).

of the *Succession Law Reform Act*. However, this recommendation is not intended to exclude from section 32 a claim that would otherwise fall within section 32(4). For example, section 32(4) defines a mortgage to include, among other things, a "claim upon . . . property for unpaid purchase money". It is not intended that our recommendation would exclude such a claim from the operation of section 32 merely because such a claim has been reduced to judgment and a writ of seizure and sale has been recorded.

Finally, the Commission found it necessary to re-consider the fundamental rule embodied in section 32, in the light of modern commercial and banking practice. It is relatively common practice for banks, when making a business loan, to require a collateral mortgage on the borrower's personal assets as security. Thus, for example, a testator might have borrowed funds for his business, secured by a collateral mortgage on his house. If the testator left the business to his son, and the house to his wife, without expressing an intention to the contrary, section 32 would require the wife to discharge the mortgage debt irrespective of the fact that the debt was incurred to benefit the business. The testator, on the other hand, would probably have expected the debt to be paid out of the business bequest to his son. This potential inequity, in our view, is not addressed adequately by the section.[167]

Our attempts to resolve this difficulty, for example, by restricting the application of the section to purchase money charges, or charges intended or suffered by the testator with respect to the particular property, or by ensuring that the section would not apply to collateral mortgages, all proved unsatisfactory. Indeed, given the pervasiveness of the above practice and the unfairness of the result, it was even suggested that the presumption in section 32 should be reversed.

Ultimately the Commission concluded, however, that the presumption in section 32 should be retained, as modified by the above recommendations. However, the harshness of a strict application of the statutory rule, in our view, should be tempered by the creation of a judicial discretion that would permit the court to deviate from the rule in appropriate circumstances.[168] The Commission recommends, therefore, that the court should have the discretion to order the payment of a debt secured on property in a manner other than as provided for in section 32 of the *Succession Law Reform Act* where it is of the opinion that this more closely approximates the wishes of the testator. This recommendation, of course, is simply the corollary, within

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[167] While it is true that the section does permit an informed testator to establish a scheme for the payment of such debts, the problem of the uninformed testator remains.

[168] For a further illustration of the type of circumstance in which it might be desirable for the court to have the discretion to deviate from the rule in s. 32, see *Perry v. Hicknell* (1981), 34 O.R. (2d) 246, 128 D.L.R. (3d) 63 (H.C.J.). In that case, while the testator probably intended certain life insurance proceeds to be used to satisfy the mortgage on his house, effect could not be given to this contrary intention since it was not clearly expressed in the will, deed or other document.

the context of secured debts, of our earlier recommendation for a judicial discretion within the context of ordinary debts.

4. ASSERTION OF CLAIMS AGAINST THE ESTATE

(a) Introduction

In this section we consider the procedures by which claims against an estate are asserted and by which disputes concerning those claims are resolved. With respect to the former, we recommend a system of notification of claims. With respect to the latter, we propose a summary claims procedure for the contestation of claims made against an estate. Immediately below, however, we discuss a prior issue, namely, the nature of the claims that should be subject to these procedures.

(b) Meaning of "claims"

At present, there is no definition of the word "claim", in either the *Trustee Act* or the contestation of claim provisions in the *Estates Act*.[169] In this latter context, however, the meaning of the phrase "claim or demand" has been described as follows:[170]

> The 'claim or demand' referred to in [section 69(1) of the *Estates Act*] is clearly a claim or demand against an estate by a creditor for payment of a money demand. . . . The words 'claim or demand' do not extend to a claim for tort for unascertained damages before judgment recovered therefor. Nor to a claim for a legacy. Nor to a claim for foreclosure; nor to a claim for dower after the widow's death. But apparently it would cover a claim that a promissory note given by the claimant to the deceased had been paid off by services rendered to him during his lifetime.

It should be noted, however, that section 70 of the *Estates Act,* which was added to the Act in 1946,[171] was enacted to extend the contestation procedure to unliquidated claims.

In the view of the Commission, the present rule, which excludes claims for legacies from the contestation procedure, is entirely appropriate, since claims for legacies are not third party claims. However, there appears to us to be no reason to restrict the proposed notification and contestation procedures to "claims and demands", as currently interpreted.

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[169] R.S.O. 1980, c. 491, ss. 69 and 70. This Act was formerly known as the *"Surrogate Courts Act"*; the statute was renamed by the *Court Reform Statute Law Amendment Act, 1989*, S.O. 1989, c. 56, s. 48(25). Sections 69 and 70 are discussed *infra*, this ch., sec. 4(d).

[170] Hull and Cullity, *Macdonell, Sheard and Hull on Probate Practice* (3d ed., 1981), at 360-61.

[171] Section 65a [now s. 70] was enacted by *The Surrogate Courts Amendment Act, 1946*, S.O. 1946, c. 93, s. 12.

While it might have been thought appropriate to exclude property ownership claims from the contestation procedure, limited provision for such claims already exists in section 71 of the *Estates Act*:

> 71. Where the personal representative of a person claims the ownership of any personal property not exceeding in value $800 and his claim is disputed by any other person, the dispute may be determined in a summary manner and section 69 applies with necessary modifications.

This section, it has been suggested,[172] was enacted as a response to the decision in *Re Graham*,[173] which held that a claimant seeking to establish a *donatio mortis causa* did not come within the contestation provision because the court was not asked to establish the validity of a debt against the estate by a creditor. By enacting section 71,[174] the legislature has acknowledged that certain property claims should be disposed of by the summary procedure. We agree that it should be possible to resolve property claims by means of the summary procedure, but we are of the view that the restriction contained in section 71 is entirely unnecessary.

One of the fundamental purposes of the notification process is to provide the estate trustee with complete information respecting the liabilities of the estate, and to facilitate the distribution process. Similarly, the contestation procedure is intended to facilitate the expeditious administration of estates by providing for the summary resolution of disputed claims. Accordingly, in our view, the notification and contestation system should comprehend all third party claims. The Commission therefore recommends that, for the purpose of the proposed notification and contestation procedures, the word "claimant" should be defined to mean a person who has a claim against the estate of the deceased, whether arising prior, or subsequent,[175] to the death of the deceased, in respect of a contract, tort, property interest in any property of the deceased, or any other cause, whether the claim is contingent or not, liquidated or unliquidated, secured or unsecured, matured or unmatured.

(c) Notification of Claims

(i) Advertising for Creditors and Other Claimants

Thus far in our discussion, we have assumed that all claims against the estate have been ascertained by the personal representative. However, if one or more claims are not ascertained before the assets of the estate are

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[172] Hull and Cullity, *supra*, note 170, at 361.

[173] (1911), 25 O.L.R. 5 (H.C.J., C.P. Div.).

[174] Section 69a (now s. 71) was enacted by *The Surrogate Courts Act, 1927*, S.O. 1927, c. 31, s. 5.

[175] It should be recalled that, earlier in this report, we recommended that an estate trustee should be able to enter into contracts in a representative capacity, in which case the

distributed to the beneficiaries, the personal representative will be personally liable to the claimants, to the extent of the value of the estate, whether or not she had notice of such claims.[176] This liability, however, may be avoided by complying with section 53 of the *Trustee Act*,[177] which provides as follows:

> 53.—(1) Where a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or of a particular class or classes of creditors, where the creditors are not designated by name therein, or a personal representative has given such or the like notices as, in the opinion of the court in which such trustee, assignee, or personal representative is sought to be charged, would have been directed to be given by the Supreme Court in an action for the execution of the trusts of such deed or assignment, or in an administration suit, for creditors and others to send in to such trustee, assignee, or personal representative, their claims against the person for the benefit of whose creditors such deed or assignment is made, or against the estate of the testator or intestate, as the case may be, at the expiration of the time named in the notices, or the last of the notices, for sending in such claims, he may distribute the proceeds of the trust estate, or the assets of the testator or intestate, as the case may be, or any part thereof among the persons entitled thereto, having regard to the claims of which he has then notice, and is not liable for the proceeds of the trust estate, or assets, or any part thereof so distributed to any person of whose claim he had not notice at the time of the distribution.
>
> (2) Nothing in this section prejudices the right of any creditor or claimant to follow the proceeds of the trust estate, or assets, or any part thereof into the hands of persons who have received the same.
>
> (3) Subsection (1) does not apply to heirs, next of kin, devisees or legatees claiming as such.

While section 53 gives no legislative guidance as to the form, content, placement, or timing of the advertisement, the time limits to be specified for the notification of claims, or the warnings to be given to claimants,[178]

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estate trustee would not be liable personally. Judgments against the estate trustee in her representative capacity would be satisfied from the assets of the estate. See *supra*, ch. 2, sec. 4(a)(iii).

[176] *Smith v. Day* (1837), 2 M. & W. 684, [1835-42] All E.R. Rep. 521 (Ex. Ct.); *Hill v. Gomme* (1839), 1 Beav. 540, 48 E.R. 1050, on appeal 5 My. & Cr. 250, 41 E.R. 366 (L.C.); and *Knatchbull v. Fearnhead* (1837), 3 My. & Cr. 122, 40 E.R. 871 (L.C.).

[177] *Supra*, note 5. Similar provisions may be found in Newfoundland (*The Trustee Act*, R.S.N. 1970, c. 380, s. 25); British Columbia (*Trustee Act*, R.S.B.C. 1979, c. 414, s. 38); and Saskatchewan (*The Trustee Act, supra*, note 45, s. 78).

[178] By contrast, considerable detail is prescribed in Nova Scotia (*Probate Act*, R.S.N.S. 1989, c. 359, s. 43); Prince Edward Island (*Probate Act, supra*, note 45, s. 47); and Alberta (*Administration of Estates Act, supra*, note 45, s. 38).

these matters had been well settled as a matter of practice.[179] Recently, however, it would appear that there is no longer a consensus among estates practitioners as to the requirements imposed by section 53. For example, while some practitioners are of the view that the advertisement must be published on three occasions, others are of the view that two placements are sufficient. Similarly, there is some divergence of opinion respecting the type of publication in which the advertisement must appear, the time limits for submission of claims, the content of the advertisement, and the nature of the warning that must be given to claimants. In the result, there is considerable uncertainty respecting the advertising requirement.

It will be noted that the *Trustee Act* does not impose a mandatory requirement of advertising for creditors, although there can be considerable incentives for a personal representative to do so. The most obvious reason for a personal representative to advertise for creditors is to avoid personal liability with respect to any claims asserted after the estate has been distributed, of which the personal representative had no notice. Of course, since such a creditor may still advance her claim against the beneficiaries of the estate,[180] there would be little purpose in advertising where the personal representative is also the sole beneficiary of the estate. Nevertheless, the personal representative might be required to advertise for creditors in a number of other circumstances. First, section 25 of the *Estates Administration Act*[181] provides that no distribution of an intestate's estate can be made until

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[179] See, for example, Schnurr, "Debtor-Creditor Considerations Relating to Estates and Trusts", in Springman and Gertner, *supra*, note 34, 161, at 163:

> The accepted procedure is to place the advertisement on three separate occasions, allowing three to six weeks between the date that the advertisement is first placed and the date by which the claims must be received by the personal representative.

See, also, Armstrong, *Estate Administration*[:] *A Solicitor's Reference Manual* (1984), at 3-40, where it is stated that the practice is to insert the advertisement "on three different occasions . . . in a daily newspaper in the area where the deceased lived and worked at the time of death". Further, it is usual to "allow at least one month from the date of the first publication to the date fixed for filing of claims": *ibid.*

A form of advertisement, in general use in Ontario, is provided in both publications. See Schnurr, at 162, and Armstrong, at F-66.1.

[180] Although a creditor of an estate would have no right, at law, to recover payment of his debt against a beneficiary, the creditor's right to a refund was developed in equity. This remedy was described in *Harrison v. Kirk*, [1904] A.C. 1, at 7, [1900-03] All E.R. Rep. 680 (H.L.), in the following terms:

> [T]he Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of court or in court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who derive title from the deceased testator or intestate.

See, also, s. 53(2) of the *Trustee Act, supra*, note 5, which confirms that the creditor's right to follow assets into the hands of the beneficiaries is not prejudiced by the section.

[181] *Supra*, note 86, as am. by S.O. 1983, c. 23, s. 2.

after the expiration of one year from the date of death, unless the personal representative has complied with section 53 of the *Trustee Act*. Therefore, in the case of an intestacy, if the personal representative wishes to distribute the estate within one year after the death of the intestate, she must advertise for creditors. Second, proof that the personal representative has advertised for creditors might be required by the court on a passing of accounts.[182] Until November 1, 1982, on the first passing of accounts, a personal representative was required to file an affidavit showing whether an advertisement for creditors had been published.[183] Although the prescribed form of Application to Pass Accounts[184] still asks, on the first passing of accounts, whether there has been publication of an advertisement for creditors, the requirement that an affidavit proving publication be filed was repealed as of November 1, 1982.[185] While existing legislation does not impose a mandatory advertising requirement, the current practice appears to be that, on a passing of accounts, advertising will be required unless it is dispensed with by the court.[186] Finally, where the personal representative does not obtain a formal passing of accounts, current practice would seem to require evidence of advertising for creditors before the court will make an order for the surrender of an administration bond[187] for cancellation.[188] It has been suggested that the affidavit in support of such an application must disclose, among other things, the following:[189]

> That the debts of the deceased have been paid. Proof of advertisement for creditors should be filed. If this has not been done the reason for the omission should be given and full information supplied upon which the Judge may

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[182] The passing of accounts is discussed *infra*, ch. 6.

[183] Rules Governing Proceedings Under the *Estates Act*, R.R.O. 1980, Reg. 925 (hereinafter referred to as "Estates Rules"), r. 60(2).

[184] See *ibid.*, Appendix A, Form 52, en. by O. Reg. 845/82, s. 11.

[185] O. Reg. 845/82, s. 3.

[186] See Hull and Cullity, *supra*, note 170, at 369-70, where the authors, referring to the former requirement that an affidavit proving publication be filed, suggested that "the rule contemplates the filing of an affidavit justifying the deficiency when there has been no advertisement for creditors. This rule would apply only where the accounts of the estate of a deceased person are being passed." Presumably such a deficiency would still have to be justified on a passing of accounts, notwithstanding the repeal of the affidavit requirement.

[187] Administration bonds are discussed *infra*, this ch., sec. 7.

[188] Cancellation, in these circumstances, is pursuant to s. 68 of the *Estates Act, supra*, note 169, which provides, in part, as follows:

> 68. Where an executor or administrator has produced evidence to the satisfaction of the judge that the debts of the deceased have been paid and the residue of the estate duly distributed, the judge may make an order directing the bond or other security furnished by the executor or administrator to be delivered up to be cancelled. . . .

[189] Hull and Cullity, *supra*, note 170, at 252.

conclude that there are no outstanding debts. The source of information of the deponent should be disclosed.

Notwithstanding these factors, in practice, advertisements for creditors are published in connection with only a minority of estates. In each case, the personal representative must balance the cost of advertising against the potential liability she might incur if she does not advertise. Of course, a scheme of advertising is intended not only to enable the personal representative to identify actual and potential liabilities of the estate, but also to give notice to claimants that the debtor has died, and to advise them of the person to contact with respect to the claim. In practice, however, it would seem that creditors are relatively successful at keeping informed about their debtors, and in most cases are able to determine who will settle their claims without the need for such notice.

In certain jurisdictions where advertising for creditors is mandatory, for example, Nova Scotia,[190] and Prince Edward Island,[191] advertising costs are minimized by requiring publication of the advertisement in the provincial Gazette. The Commission considered whether a similar requirement would be practical or useful in Ontario. The *Ontario Gazette* is a province-wide publication, and is relatively accessible to those engaged in the business of granting credit. Moreover, the cost of advertising in the *Ontario Gazette* would be substantially lower than the present cost of advertising in the commercial newspapers, particularly if the requirement were to publish the advertisement on a single occasion only.[192] However, advertisements published in the *Ontario Gazette* are less likely to come to the notice of individual creditors, or small business creditors, who advance credit in a relatively small number of cases. This type of creditor would have to undertake periodic searches of the Gazette to ensure that no advertisements had been missed. On the other hand, perhaps undue concern ought not to be shown for such creditors, since they are more likely to have a closer relationship with their debtors, and are therefore more likely to learn that their debtors had died.

The Commission also considered a procedure for providing public notice through the court clerk's office. This would involve the establishment of a register, in which the court clerk would record the relevant information concerning decedents' estates throughout the province. The establishment of such a register would put the onus on creditors to conduct periodic searches. While this obligation might be regarded by some as unduly onerous, particularly if searches could be conducted only at a central location for the province, this difficulty could be alleviated by the periodic publication of the register index.

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[190] *Probate Act, supra*, note 178.

[191] *Probate Act, supra*, note 45.

[192] As noted above, *supra*, note 179, the present practice is to publish the advertisement on 3 separate occasions.

For a variety of reasons, the Commission has rejected both of these alternatives. First, in our view, neither the *Ontario Gazette* nor the register would be a particularly effective means of giving notice to creditors. Second, the additional cost of publication associated with the increase in size of the *Ontario Gazette*, or the cost of establishing and maintaining the proposed register, would be substantial. Finally, both systems would apply only to estates where there has been an application for an estate trustee certificate.[193] We have considered the situation of creditors of estates where there has been no application for an estate trustee certificate, and we have concluded that the additional administrative burden that would be required to deal with such estates would be unjustifiable.

On balance, the Commission has concluded that, subject to the recommendations made below, the present position with respect to advertising for creditors should be retained. In most cases, we believe, the necessity of advertising for creditors and other claimants should be a matter within the discretion of the estate trustee, and the present consequences of advertising or a failure to advertise should be retained. However, we believe that the protection now provided by section 53 of the *Trustee Act* should be available where the estate trustee has not advertised for creditors, but where the creditors have had a reasonable opportunity to give notice of their claims to the estate trustee. A six month period following the death of the deceased appears to us to be a reasonable period for the notification of claims. Moreover, we believe that the same rules should apply in the case of both testate and intestate estates. Finally, we have concluded that, in order to clarify the present confusion respecting the advertising requirement, the specific elements of the requirement should be set out expressly. In this regard, we have attempted to balance the interests of creditors and other claimants in receiving notice of the death of the debtor and the identity of the person to whom they should submit their claims, with the interests of those who are beneficially interested in the estate in minimizing the expenses associated with the administration.

Accordingly, the Commission recommends as follows:

(1) The necessity of advertising for the notification of claims by creditors and other claimants should be a matter within the discretion of the estate trustee.

(2) Where an estate trustee has advertised for the notification of claims in accordance with the recommendations contained in paragraph (3) below, and the time for the notification of claims as set out in the advertisement has elapsed, or where the estate trustee has not advertised for the notification of claims, but six months have elapsed from the date of death of the deceased, the estate trustee should be free to pay the claims of which she then has notice and to distribute the property of the deceased to the persons entitled

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[193] Estate trustee certificates are discussed *supra*, ch. 2, sec. 1(d).

thereto. In these circumstances, the estate trustee should not be personally liable to any claimant of whom she did not have notice at the time of payment or distribution.

(3) For the purposes of paragraph (2) above, advertisements for the notification of claims

(a) should be published on two separate occasions, once per week for two consecutive weeks;

(b) should be published in a newspaper having general circulation in the locality or localities in which the deceased resided, worked, and carried on business, at the time of death;

(c) should provide a time limit for the notification of claims that is not less than four weeks from the date on which the advertisement is first published; and

(d) should contain the following:

(i) the name of the deceased;

(ii) the deceased's place or places of residence, employment, and business;

(iii) the date of death;

(iv) the name and address of the person to whom notice of claim should be given;

(v) the date by which notice of claim should be given; and

(vi) a warning that the estate trustee may distribute the assets of the estate after the date specified having regard only to the claims of which she then has notice.

(4) Section 25 of the *Estates Administration Act*, which provides that no distribution of an intestate's estate can be made until after the expiration of one year from the date of death unless the personal representative has complied with section 53 of the *Trustee Act*, should be repealed.

(ii) Method of Notification Where Estate Trustee Not Appointed

At present, section 72(1) of the *Estates Act*[194] permits creditors to file a notice of claim with the office of the local registrar of the Ontario Court (General Division) where no personal representative has been appointed.

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[194] Section 72(1) of the *Estates Act, supra*, note 169, provides as follows:

> 72.–(1) The *Limitations Act* does not affect the claim of a person against the estate of a deceased person where notice of the claim giving full particulars of the claim and verified by affidavit, is filed with the executor or administrator of the estate at any time prior to the date upon which the claim would be barred by the *Limitations Act*, but

We have concluded that the ability to file a notice of claim with the court should continue, although, in our view, the purpose of such notice should not be limited to the effect of the *Limitations Act* as it is in section 72(1). Such a notice, filed with the court, should have the same effect, for all purposes, as if it had been filed with the estate trustee. We have further concluded that the present requirement for an affidavit of verification, as required by section 72(1), is unnecessary. If the claimant chose to proceed by way of ordinary action, no such affidavit would be required; and there would appear to be no compelling rationale for the additional requirement in the present context.[195] Moreover, the affidavit requirement creates a trap for the unwary, making it difficult for claimants who are not represented by solicitors to give proper notice of their claims. In order to prevent claims from being filed with the court in anticipation of death, however, the Commission has concluded that the claimant should be required to file proof of death of the debtor, in addition to his claim. The Commission has also concluded that a procedure should be established to ensure that a claim filed with the court would be brought to the attention of the office for the county or district in which an application for an estate trustee certificate is subsequently made.

The Commission recommends, therefore, that, where no application for an estate trustee certificate has been made, a claimant should be able to file her claim with a local registrar of the Ontario Court (General Division). Upon receipt of such claim and evidence of death of the debtor, the local registrar should immediately send a copy of this material to the Estate Registrar for Ontario. The Estate Registrar for Ontario should keep a file of such claims, and should notify any local registrar when an application for an estate trustee certificate is subsequently made.[196]

(iii) Where Estate Trustee Is Deemed to Have Received A Notice of Claim

Earlier in this section,[197] we recommended a regime respecting advertising for the presentation of claims by creditors and others. Where the estate trustee complies with our recommendations in that regard, she would be protected from personal liability if she distributes the estate taking into

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where no executor or administrator has been appointed, the notice may be filed in the office of the registrar of the surrogate court of the county where the deceased person resided at the date of his death.

[195] Sections 69(2) and 70(2) of the *Estates Act, supra*, note 169, also require the filing of an affidavit of verification. These requirements are discussed *infra*, this ch., sec. 4(d).

[196] It should be noted that ss. 41-45 of the *Estates Act, supra*, note 169, require that local registrars give notice of every application for a grant of probate or administration to the Estate Registrar for Ontario. In the absence of a special court order, probate or administration cannot be granted unless the local registrar has received a certificate from the Estate Registrar for Ontario stating that no other application appears to have been made in relation to the property of the deceased.

[197] *Supra*, sec. 4(c)(i).

account only those claims of which she had notice prior to the distribution. In this section we consider whether notice of all claims must be given to the estate trustee, irrespective of their nature, or whether circumstances exist in which the claimant ought not to be required to file a notice of claim with the estate trustee.

The first type of claim to be considered is a federal or provincial tax claim. While an estate trustee might encounter some difficulty in ascertaining the existence of these claims, it would be unreasonable, in our view, to exclude such claims for a failure to notify the estate trustee. We have concluded, therefore, that the estate trustee ought to bear the burden of determining the existence of tax claims and, accordingly, should be deemed to have received notification of such claims.

In the case of other statutory claims, the Commission is similarly of the view that it would be unreasonable to exclude all such claims for a failure to give notice. On the other hand, the Commission acknowledges that it would be equally unreasonable to require the estate trustee to ascertain the existence of all statutory claims. On balance, the Commission has concluded that the estate trustee should be deemed to have received notification of only those statutory claims that would be disclosed upon a search of a public register. We have reached a similar conclusion concerning secured claims. In this context, it is the view of the Commission that, rather than imposing the burden on secured creditors to monitor whether their debtors are still alive, the balance of convenience would seem to require that the estate trustee conduct the appropriate public register searches and determine whether the assets of the estate are encumbered.

The Commission has also decided that the estate trustee should be deemed to have received notification of writs of seizure and sale that have been filed with the sheriff, and notices of garnishment that have been filed with the sheriff of the county in which the deceased resided at the time of her death. With respect to the former, however, until the adoption of a province-wide system for the filing of writs of seizure and sale,[198] the duty of the estate trustee to search for writs should be limited. In these circumstances, the estate trustee should be deemed to have received notification of writs of seizure and sale filed with the sheriff only in those counties or districts in which, to the knowledge of the estate trustee, property of the estate is situated. With respect to notices of garnishment, while the registrar of the court issuing a notice of garnishment is required to send a copy of the notice to the sheriff of the county in which the debtor resides,[199] it would appear that no public register is maintained of such notices. Nevertheless, the information is readily available to the sheriff, and the sheriff should be required to provide particulars, in writing, of notices of garnishment filed in

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[198] See, for example, the recommendations made in Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (1981) Part I, at 145 *et seq.*

[199] Rules of court, *supra*, note 6, r. 60.08(6), as am. by O.Reg. 441/90, s. 11.

her office in response to an inquiry from an estate trustee of a deceased debtor.

Finally, the Commission has concluded that the estate trustee should be deemed to have received notification of support orders[200] filed with the Director of Support and Custody Enforcement under the *Support and Custody Orders Enforcement Act, 1985*.[201] Again, no public register of such orders is maintained, although the eight regional support and custody orders enforcement offices are able to respond to an inquiry from an estate trustee of a deceased debtor with information concerning the entire province. Indeed, we understand that, as a matter of practice, the support and custody orders enforcement office responds to such enquiries at present. However, if the obligation is to be imposed on estate trustees to search for support orders filed with the Director of Support and Custody Enforcement, there should be a corresponding obligation on the Director to respond to such inquiries. Therefore, the Commission has concluded that the Director of Support and Custody Enforcement should be required to provide particulars, in writing, of support orders filed in her office, in response to an inquiry from an estate trustee of a deceased debtor.

With the exception of tax claims, we concluded above that the estate trustee should be deemed to have received notification of certain types of claim, the existence of which would be disclosed either upon a search of a public register, or upon a request for information from the relevant authority. In order to protect the estate trustee from the possibility that a claim might be registered or filed after the appropriate searches have been conducted, but before a distribution of any portion of the estate, the Commission has concluded that the estate trustee should be deemed to have received notification of such claims only if they are registered or filed more than ten working days before a distribution of the estate. This would ensure that the estate trustee is not deemed to have received notification of claims that she has not had an adequate opportunity to discover prior to a distribution. Of course, it should be emphasized that such claimants would be permitted to give actual notice of their claims to the estate trustee at any time.

Finally, we should note that, in most cases, the above recommendations would not alter significantly the burden already undertaken by personal representatives. For example, personal representatives currently ensure that any tax liabilities of the deceased are satisfied. Similarly, it is often necessary for the personal representative to search the title to the deceased's realty,

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[200] It should be noted that, in s. 1 of the *Support and Custody Orders Enforcement Act, 1985*, S.O. 1985, c. 6, "support order" is broadly defined to include not only a provision for the payment of money as support or maintenance contained in an order made in or outside Ontario and enforceable in Ontario, but also a wide variety of support provisions contained in a marriage contract, co-habitation agreement or separation agreement that is enforceable under section 35 of the *Family Law Act, 1986*, S.O. 1986, c. 4.

[201] *Supra*, note 200.

or determine whether there are any encumbrances on the deceased's personalty. It has also been suggested that "[i]t is good practice to search executions to determine if any creditors' claims have been filed".[202] To a large extent, therefore, our recommendations would simply formalize and clarify the present practice. On the other hand, while no search is ordinarily made at present for notices of garnishment, since the estate trustee will be required under our proposals to conduct a search for writs of seizure and sale filed with the sheriff in the counties or districts in which, to the knowledge of the estate trustee, property of the estate is situated—including, of course, the county or district in which the deceased resided at the time of her death—little additional burden would be imposed on the estate trustee by also requiring her to search for notices of garnishment in that office.

The Commission therefore recommends as follows:

(1) Subject to the recommendations made in paragraphs (2) and (3) below, an estate trustee should be deemed to have received notification of the following:

  (a) tax claims;

  (b) secured claims and claims that arise by operation of statute, the existence of which can be determined by the search of a public register;

  (c) writs of seizure and sale that have been filed with the sheriff;

  (d) notices of garnishment that have been filed with the sheriff of the county in which the deceased resided at the time of her death; and

  (e) support orders filed with the Director of Support and Custody Enforcement under the *Support and Custody Orders Enforcement Act, 1985*.

(2) An estate trustee should be deemed to have received notification of the claims set out in paragraphs (1)(b)-(e) only if such claims are registered or filed more than ten working days before a distribution of any portion of the estate.

(3) Until the adoption of a province-wide system for the filing of writs of seizure and sale, the estate trustee should be deemed to have received notification of writs filed with the sheriff only in those counties or districts in which, to the knowledge of the estate trustee, property of the estate is situated.

(4) The sheriff should be required to provide particulars, in writing, of notices of garnishment filed in her office in response to an inquiry from an estate trustee of a deceased debtor.

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[202] Dickson and Wilson, *Ontario Estate Practice* (2d ed., 1986), para. 224, at 44.

(5) The Director of Support and Custody Enforcement should be required to provide particulars, in writing, of support orders filed in her office in response to an inquiry from an estate trustee of a deceased debtor.

(iv) Effect of Failure to Give Notice

The Commission now turns to consider the consequences that should flow from a failure of a claimant to notify the estate trustee of her claim. Under present law, a creditor who fails to notify the personal representative of her claim within the required time is not necessarily without a remedy. Such a creditor may still have her claim satisfied out of any assets still remaining in the hands of the personal representative. Alternatively, as we noted earlier,[203] the creditor may seek to recover some of the distributed assets from the hands of the beneficiaries. Section 53(2) of the *Trustee Act* provides as follows:

> 53.–(2) Nothing in this section prejudices the right of any creditor or claimant to follow the proceeds of the trust estate, or assets, or any part thereof into the hands of persons who have received the same.

The issue for determination by the Commission is whether the present partial preclusion of claims that are not notified within time should be made absolute. An example of this latter approach is provided by section 3-803(a) of the United States Uniform Probate Code,[204] which provides as follows:

> 3-803(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent unless presented as follows:
>
> (1) within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with Section 3-801; provided, claims barred by the non-claim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state;
>
> (2) within [3] years after the decedent's death, if notice to creditors has not been published.

The approach embodied in the above provision favours early distribution of estates, and opts for certainty of tenure for beneficiaries. While these undoubtedly are desirable objectives, we have concluded that the interests

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[203] See *supra*, note 180 and accompanying text.

[204] *Supra*, note 108.

of creditors and other claimants would be unduly prejudiced by such a regime.

Earlier in this section[205] we recommended that the estate trustee should be permitted to distribute the estate, without advertising for creditors, after six months from the death of the deceased. In these circumstances, the estate trustee would not be personally liable to any claimant of whom she did not have notice at the time of distribution. To preclude any remedy to a creditor who has failed to notify the estate trustee would be, in effect, to shorten the limitation period to six months after the death of the deceased. At present the limitation period is two years.[206] We acknowledge that retention of the present system would keep beneficiaries at risk for up to two years, but, unlike creditors and other claimants, beneficiaries are volunteers, and it would not be inequitable, in our view, to keep volunteers at risk for an additional eighteen months. We have concluded, therefore, that the type of system that now exists respecting the rights of a creditor or claimant who has failed to notify the personal representative should be retained, and we so recommend.

Accordingly, where an estate trustee has advertised for the presentation of claims, and the time for the presentation of claims as set out in the advertisement has elapsed, or where the estate trustee has not advertised for the presentation of claims, but six months have elapsed from the date of death of the deceased, a claimant who has not given notice of her claim to the estate trustee would not be barred from claiming payment of her claim, as follows:

(a) from the assets still in the hands of the estate trustee;

(b) from the assets distributed to beneficiaries of the estate, to the extent of such assets or the proceeds thereof, subject to the recommendation we shall make in chapter 5 concerning the remedy of an aggrieved creditor for an estate trustee's improper exercise of the power to make appropriations or to make distributions in kind;[207]

(c) by the enforcement of her security against an asset of the estate by which it is secured; or

(d) where the claim is protected by liability insurance to the extent of its limits.

Of course, where a claim arises against the estate trustee in her personal capacity, the claimant would not be barred from claiming against the estate trustee.

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[205] *Supra*, sec. 4(c)(i).

[206] *Trustee Act, supra*, note 5, s. 38, as am. by S.O. 1984, c. 11, s. 216(3).

[207] See *infra*, ch. 5, sec. 4(c)(ii).

(d) Contestation of Claims

The Commission now turns to consider the procedures that should be available to resolve a dispute, once the estate trustee has received notice of a claim. In that connection, the Commission makes a number of recommendations respecting a summary claims procedure by which creditors might be permitted to assert their claims against the estate of a deceased person.[208] At present, a summary procedure for the contestation of claims against estates is contained in the *Estates Act*.[209] We have concluded that, while these provisions are generally satisfactory, some modifications would appear to be desirable.

First, the procedures contained in sections 69 and 70 of the *Estates Act* apply where a claim or demand "is made against the estate of a deceased person or where the personal representative has notice of such a claim or demand".[210] It is generally understood, however, that section 69 applies to liquidated claims while section 70 applies to unliquidated claims, although it has been suggested that "it is hard to imagine claims that would come under [section 70] and not [section 69]".[211] This complexity, in our view, is entirely unnecessary, and we have concluded that sections 69 and 70 should be consolidated into a single provision dealing with the contestation of all claims made against the estate.

Pursuant to the current provisions,[212] where the personal representative has notice of a claim or demand, she may serve a notice in writing upon the claimant, indicating that the personal representative contests the claim, in whole or in part. This notice of contestation must refer specifically to the section under which it is given.[213] In the view of the Commission, a simple reference in the notice to the section under which it is given might not be sufficient to convey to the claimant the rights available to her under the section, or the consequences that flow from her failure to take appropriate action. The Commission has concluded that these matters, discussed below, should be set out expressly in the notice of contestation.

Within thirty days after receiving the notice of contestation, or within three months if a judge, on application, allows, the claimant may apply for

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208 Of course, instead of utilizing the summary claim procedure, a creditor has the option of commencing an action, in the ordinary way, against the personal representative of the estate. See the *Trustee Act, supra*, note 5, s. 38(2), and the rules of court, *supra*, note 6, r. 9, as am. by O. Reg. 366/87, s. 1.

209 *Supra*, note 169, ss. 69-71.

210 *Estates Act, supra*, note 169, s. 69(1). The wording of s. 70(1) is slightly different. It applies where a claim or demand "is made against the estate of a deceased person or where the personal representative has notice or knowledge of the claim or demand".

211 Widdifield, *supra*, note 49, at 57.

212 *Estates Act, supra*, note 169, ss. 69(1) and 70(1).

213 *Ibid*. See, also, *Re Lawrence*, [1950] O.W.N. 571 (H.C. Div.).

an order allowing his claim by filing "a statement of his claim verified by affidavit and a copy of the notice of contestation".[214] Failure by the claimant to file these documents, within the required time, results in the claimant being deemed to have abandoned his claim and the claim being barred.[215] In the view of the Commission, the requirement that the statement of claim be verified by affidavit is entirely unnecessary. It should be recalled that it is always open to the claimant to commence an ordinary action against the estate trustee, in which case no such affidavit would be required. A sufficient record for the summary proceeding may be created from the statement of the creditor's claim and the notice of contestation.

It has been held that the personal representative must contest a claim before the summary procedure set out in the *Estates Act* is available to a claimant.[216] Fanjoy Surr. Ct. J. stated that "[t]he plain language of s. 68 [now section 69] indicates that a 'notice of contestation' in writing by the personal representative is a necessary preliminary to the application of the section and the procedure set out therein".[217] He concluded as follows:[218]

> [T]here must be a contestation of the claim before the procedure set out in s. 68 can be used by a claimant. The practical effect of this conclusion is that the executors of an estate can avoid the provisions of s. 68 by simply failing to contest a claimant's claim. The remedy lies in the legislature and not in the Courts.

The Commission is of the view that the estate trustee should not be permitted to defeat the purpose of the legislative scheme simply by refusing or neglecting to contest a claim. The speedy resolution of claims and the expeditious administration of the estate are generally in the interests of everyone concerned in the administration. Accordingly, the Commission recommends that if within sixty days after the estate trustee has notice of a claim she has neither contested the claim, nor paid or allowed the claim, the claimant should be permitted to commence proceedings against the estate for the amount of the claim, in accordance with the summary claims procedure.

It has also been held that sections 69 and 70 do not confer jurisdiction on the court to adjudicate a counterclaim by the estate.[219] "[T]he Surrogate

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[214] *Estates Act, supra*, note 169, ss. 69(2) and 70(2).

[215] *Ibid.*

[216] *Re Somers* (1979), 6 E.T.R. 101, 15 C.P.C. 165 (Ont. Surr. Ct.) (subsequent references are to 6 E.T.R.).

[217] *Ibid.*, at 103.

[218] *Ibid.*, at 104. See, also, Schnurr, *supra*, note 179, at 169-70, where this requirement was identified as a major weakness of the present provisions, from the point of view of the creditor who wishes to have his claim determined as quickly as possible.

[219] *Re Huffmon and Breese* (1974), 3 O.R. (2d) 416 (H.C.J.).

Court's jurisdiction . . . with respect to 'claims' is in reference to claims made *against* the estate".[220] In the view of the Commission, the contestation procedure should permit the hearing of a counterclaim, and the judge should have the authority to give judgment to the estate for the excess of any counterclaim against the claimant.

Where a claimant applies to the court to have her claim determined, the present contestation of claims provisions require that the Official Guardian be given notice of the application if minors are concerned.[221] Notice of the application may also be given "to such, if any, of the persons beneficially interested in the estate as the judge may direct".[222] Similarly, section 69(5) provides that "in addition to the persons to whom notice has been given, any other person who is interested in the estate has the right to be heard and to take part in the proceedings". These provisions were inserted in the Act out of a concern that the estate trustee might not defend the claims vigorously if she were not financially and personally interested in the outcome of the litigation, or that she might be in collusion with a claimant to prefer one particular claim over the claims of other creditors. We agree with the observation that the requirement of notifying the Official Guardian "is somewhat anomalous since in an ordinary action by a creditor against an estate, it is not required that the Official Guardian be named as a party defendant simply because minors have an interest in the estate".[223] We would add, however, that if the claimant had asserted her claim by commencing an ordinary action none of these additional requirements would be imposed, and we have concluded, therefore, that they should be eliminated from the summary claim procedure. On the other hand, a discretionary power in the judge to require notification of the Official Guardian, or interested parties, including creditors, might be useful, if used sparingly. In most cases, however, adequate protection from the estate trustee will be provided by the threat of action by a dissatisfied beneficiary or creditor.

The current procedure contains a provision that refers claims within the Small Claims Court jurisdiction to be heard by that court.[224] This transfer can be avoided, however, if both the claimant and the personal representative consent to have the matter heard by the judge of the Ontario Court (General Division). Clearly the purpose of this provision is to relieve the court of the burden of hearing claims involving small amounts. In addition, section 69(6) provides as follows:

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[220] *Ibid.*, at 421 (emphasis in original).

[221] *Estates Act, supra*, note 169, ss. 69(4) and 70(3).

[222] *Ibid.*

[223] Schnurr, "Claims Against Estates: Summary Procedure", in Schnurr (ed.), *Estate Litigation* (1987) 149 (hereinafter referred to as "Claims Against Estates: Summary Procedure"), at 152.

[224] *Estates Act, supra*, note 169, s. 69(3).

> 69.–(6) Where the claim, or the part of it that is contested, amounts to $800 or more, instead of proceeding as provided by this section, the judge shall, on the application of either party, or of any of the parties mentioned in subsection (5), direct the creditor to bring an action for the recovery or the establishment of his claim, on such terms and conditions as the judge considers just but, where the claimant and the personal representative consent to have the trial before the judge of the surrogate court [now the Ontario Court (General Division)], the trial shall take place and be disposed of before the surrogate court judge under this section.

As a result of this section, a contested claim in excess of $800 can be resolved in accordance with the summary procedure only where both parties agree. If either party requests that the matter not be dealt with under the summary procedure, the court must direct the creditor to bring an action for the recovery of his claim. This lack of discretion has been identified as the primary reason for the relatively little use that has been made of the present summary procedure.[225] The Commission has concluded that the jurisdiction to require the claimant to commence an action against the estate for the amount of the claim, in the ordinary manner, should continue, but it should be a matter within the discretion of the judge. Among other things, this would permit the reference of small claims to the appropriate court.

In accordance with the above conclusions, the Commission makes the following recommendations:

(1) Sections 69 and 70 of the *Estates Act* should be consolidated and amended as follows:

   (a) Where a claim or demand has been made against the estate of a deceased person, the estate trustee should be permitted to serve the claimant with a notice in writing that she contests the same in whole or in part, and if in part, state what part.

   (b) The notice of contestation should set out expressly the claimant's rights, as contained in paragraph (c) below, and the consequences for failure to take action, as contained in paragraph (e) below.

   (c) Within thirty days after the receipt of such notice of contestation of the claim, the claimant should be permitted to

      (i) commence an action against the estate for the amount of the claim in the ordinary manner and serve the estate trustee as provided in the rules of court, or

      (ii) commence proceedings against the estate for the amount of the claim, in accordance with the summary claims procedure (see paragraph (g)).

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[225] See Claims Against Estates: Summary Procedure, *supra*, note 223, at 152-53.

(d) To commence a proceeding against the estate in accordance with the summary claims procedure, the claimant should not be required to verify a statement of her claim by affidavit.

(e) If the claimant does not proceed as provided in paragraph (c) in the time limited therefor or within such time as is allowed by the judge, she should be deemed to have abandoned her claim and it should be forever barred.

(f) If within sixty days after the estate trustee has notice of a claim she has neither contested the claim, nor paid or allowed the claim, the claimant should be permitted to commence proceedings against the estate for the amount of the claim, in accordance with the summary claims procedure.

(g) The manner of proceeding in the summary claims proceedings should be prescribed by regulation.

(h) The court should have the following powers:

(i) to extend the time for the commencement of an action or proceedings or the service thereof for a period not exceeding three months from the time of the receipt of the contestation of the claim;

(ii) to give directions for the conduct of the action;

(iii) to require the claimant to commence an action against the estate for the amount of her claim in the ordinary manner;

(iv) to dispose of any counterclaim or claim for a set-off by the estate trustee and if the counterclaim or set-off exceeds the claim to render a judgment against the claimant in the amount of the excess;

(v) to prescribe the time when the judgment may be enforced where the claim is proved, but not yet recoverable;

(vi) to fix costs and order the payment of the same; and

(vii) to give directions with respect to the enforcement of any judgment, by execution or otherwise.

(2) The necessity of serving the Official Guardian in contestation of claim proceedings should be eliminated.

(3) A judge should have the power to require notice of the contestation of claim proceeding to be given to the Official Guardian if minors are concerned or in any other case where in her discretion the ends of justice would be served by serving any or all the persons beneficially interested in the estate, including creditors, and to permit them to participate in such proceedings on such terms as to costs as she shall determine.

(4) The judge should have the power to assess costs against the persons permitted to participate in a proceeding under paragraph (3) if in her opinion their participation in the proceedings added unnecessarily to the costs that the claimant or the estate would have otherwise borne.

5. CONTINGENT LIABILITIES

The existence of contingent liabilities can cause considerable difficulties for an estate trustee. At present, in the absence of statutory protection, a personal representative who distributes the assets of an estate, with notice of a contingent liability, does so at his own peril. If the contingent liability later matures, the personal representative will be personally liable to the claimant.[226] This would appear to be the case, moreover, no matter how remote the possibility that the estate will be called upon to satisfy the liability, and no matter how long the period of contingency. Under present law, therefore, in order to protect himself, the personal representative will either delay distribution of the estate, or retain a fund sufficient to meet the contingent liability when it matures. Alternatively, a personal representative could bring proceedings for administration of the estate by the court under the rules of court.[227] Although such proceedings are rarely utilized, where the assets of an estate are distributed pursuant to an order of the court, provided the personal representative has made full and fair disclosure, the personal representative will be protected.[228] As the following passage suggests, however, the principles upon which the court will order distribution, without regard to the contingent claims, have not been articulated explicitly:[229]

> In this case the executors seek the direction of the Court to distribute the estate among the residuary legatees notwithstanding the claim of a limited company in respect of unpaid shares, no calls having been made. It appears to be the practice to direct such distribution notwithstanding the existence of contingent claims, and, as the law stands, I think it is clear that the order of the Court in such a case exonerates the executors from ultimate liability to the creditor. The practice appears to have grown up gradually and in a manner which is not to my mind altogether satisfactory. One cannot help seeing that the rights of absent parties of whose claim the Court has notice may be prejudicially affected by the order. Nor are the authorities themselves in a very satisfactory state, but I think the outcome is reasonably clear.

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[226] Taylor v. Taylor (1870), L.R. 10 Eq. 477, 39 L.J. Ch. 676, app'd in *Re Berry* (1981), 34 O.R. (2d) 56, 10 E.T.R. 152 (H.C.J.).

[227] Proceedings for administration are discussed *supra*, this ch., sec. 2(b)(iii).

[228] See *Smith v. Smith* (1861), 1 Dr. & Sm. 384, 62 E.R. 426 (V.C.), and *Re Nixon*, [1904] 1 Ch. 638.

[229] *Re King*, [1907] 1 Ch. 72, at 76-77 (*per* Neville J.).

As we noted earlier in this report,[230] provisions were enacted in the *Trustee Act*[231] to provide relief for personal representatives in respect of certain contingent liabilities. The Act provides protection for a personal representative, liable as such, for "the rents . . . covenants or agreements contained in a lease or agreement for a lease",[232] or for "the rent . . . covenants or agreements contained in any conveyance on chief rent or rent-charge".[233] With respect to these sections, it has been observed as follows:[234]

> While the sections seem to invite the executor to distribute the estate, the relief given is subject to the executor retaining sufficient funds to answer identifiable future claims and may appear somewhat illusory. However, when read with other sections in the Act relieving trustees the provisions could be helpful to a trustee who did not retain a sufficient reserve.

Special provision has also been made in section 57(4) of the *Trustee Act*, which applies in the case of a deficiency of assets, for contingent liabilities of the deceased as a guarantor or endorser of a negotiable instrument. In such circumstances, the creditor is treated as a secured creditor, the security being the liability of the person primarily liable on the instrument. A secured creditor is required to value his security, and is permitted to rank upon a distribution of the assets of the estate for the unsecured deficiency only.[235] However, in the circumstances noted in section 57(4), the creditor is permitted to amend or revalue his claim after the maturity of the liability and non-payment. Section 57(4) provides as follows:

> 57.—(4) If the claim of the creditor is based upon a negotiable instrument upon which the estate of the deceased debtor is only indirectly or secondarily liable and which is not mature or exigible, the creditor shall be considered to hold security within the meaning of this section and shall put a value on the liability of the person primarily liable thereon as his security for the payment thereof, but after the maturity of such liability and its non-payment he is entitled to amend and revalue his claim.

While the statutory provisions described above would resolve some of the difficulties encountered by an estate trustee, there is a need, in our view, to address the problem of contingent liabilities in other contexts.

However, the Commission is also of the view that, in order to avoid hardship or inequity to the estate in particular circumstances, court review

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230 *Supra*, ch. 2, sec. 4(c).

231 *Supra*, note 5.

232 *Ibid.*, s. 51(1).

233 *Ibid.*, s. 52(1).

234 Widdifield, *supra*, note 49, at 63.

235 The treatment of secured creditors in a distribution under the *Trustee Act*, where there is a deficiency of assets, is discussed *supra*, this ch., sec. 2(b)(ii).

should be available. It should be recalled that the Commission earlier recommended that proceedings for administration should be retained.[236] Accordingly, an estate trustee would continue to have the alternative of dealing with contingent liabilities by bringing proceedings for the administration of the estate by the court. However, in our view, if this is the only issue to be determined, some more summary procedure should be available. In addition, we believe, the court should be provided with some guidance in dealing with contingent claims. In this respect, the United States Uniform Probate Code[237] is instructive. Section 3-810 provides as follows:

> 3—810(a) If a claim will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.
>
> (b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the Court may provide for payment as follows:
>
> (1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;
>
> (2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

While these alternative methods of dealing with contingent claims seem to us to be desirable, we believe that the court should enjoy even greater flexibility. In arriving at our recommendations in this regard, we have sought to achieve an appropriate balance between the legitimate interests of claimants in satisfying their claims, and the interests of estate trustees and beneficiaries in the expeditious administration of estates.

In order to achieve these objectives, the regime we propose involves the following elements. First, we have already recommended that contingent claims should be subject to our proposed notification and contestation procedure.[238] Accordingly, assuming the estate trustee complies with the advertising requirements, he will be protected from personal liability in respect of the contingent claim if he distributes the estate without notice of the claim. Second, we have also recommended that in situations where substantial protection exists for the claimant, for example, in the case of an assignment by the estate trustee of a long-term lease, mortgage, or other long-term obligation, the claimant's rights will be extinguished as against the Estate Trustee.[239]

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[236] *Supra*, this ch., sec. 2(c).

[237] *Supra*, note 108.

[238] *Supra*, this ch., sec. 4(d).

[239] *Supra*, ch. 2, sec. 4(b).

In these cases other sources exist to satisfy the claim. Finally, in all cases, sufficient flexibility should exist in order to permit an appropriate resolution in the particular circumstances. The Commission therefore recommends that where a contingent liability of an estate exists, and there is a desire to distribute the estate, the court upon application by an interested party should be required to provide for the disposition of the claim as follows:

(a) by the valuation of the present value of the claim (taking into account any uncertainty) and immediate payment in the same manner as a matured claim;

(b) by the arrangement for the future payment or possible payment of the claim by the creating of a trust, giving a mortgage, obtaining a bond or security from the distributee or otherwise; or

(c) by the making of such other provisions for the disposition or satisfaction of the claim as shall be equitable.

6. EVIDENCE IN ACTIONS INVOLVING ESTATES

The task faced by creditors and other claimants in establishing their claims against decedents' estates is made somewhat more difficult by the statutory requirement that their evidence must be corroborated. Section 13 of the *Evidence Act*[240] provides as follows:

> 13. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on its own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

The requirement of corroboration is one of the limited class of evidentiary rules in which the quantity of the evidence is as important as the quality. That is, the evidence of an opposite or interested party cannot be the basis of a judgment involving interests in a decedent estate unless it is qualified by the corroboration of material evidence. The danger against which the rule embodied in section 13 is directed has been described as follows:[241]

> Look at the result of acting on such evidence alone. A claimant, who cannot by possibility be contradicted, and who may be too clever and unscrupulous to break down under cross-examination, could put forward a claim founded solely on his own oath, which the Judge can detect no reason for disregarding, and which in the absence of such a rule he would be bound to act upon, the only person who could contradict it being dead. It is not a rule which depends on the character of the witness, but on the manifest danger which requires the establishment of a general rule applicable to all alike from the great difficulty or impossibility of detecting falsehood.

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[240] R.S.O. 1980, c. 145.

[241] *Re Harnett* (1886), 17 L.R. Ir. 543 (V.C.), at 547.

While the rule requiring corroboration in these circumstances had developed merely as a rule of practice, it "was made an absolute requirement by statute and is contained in many of the provincial Evidence Acts".[242]

According to section 13, the evidence that must be corroborated is that of "an opposite or interested party". It has been held that, since the section refers to an opposite or interested "party", as opposed to an opposite or interested "person", the evidence of a person who is not an actual party to the proceeding need not be corroborated, notwithstanding any interest she might have in the result.[243] Moreover, it should be noted that the evidence of one interested party cannot be used to corroborate the evidence of another having a similar interest.[244]

It should also be noted that section 13 applies whether the action is by or against the decedent's estate, and requires corroboration only in respect of any matter occurring before the death of the deceased person. Consequently, claims in respect of the actions of the personal representative need not be corroborated.[245]

While the section is silent with respect to the degree or extent of the corroboration required, it does specify that the evidence of the opposite or interested party must be corroborated by "some other material evidence". As the courts have traditionally construed the rule, it is not necessary for the opposite or interested party to re-prove his entire case by other evidence; rather, he must satisfy the court of support on some material point. In *Smallman v. Moore*,[246] Mr. Justice Kellock stated the rule in the following terms:[247]

> [T]he section here does not say that every fact necessary to be proved to establish a cause of action must be corroborated by evidence other than that of the interested party but that the evidence of the interested party itself is to be corroborated by *some other material evidence*. I do not think that the word 'matter' in the section is to be taken as synonymous with every fact required to be proved in establishing a cause of action and it has never, as far as I am aware, been so construed.

It has been held that the corroborative evidence required by section 13 "must be evidence, independent of the evidence of an opposite or interested party, which shows or tends to show that such opposite or interested party

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[242] Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974), at 409.

[243] *Re Miller Estate*, [1949] O.W.N. 569 (Surr. Ct.).

[244] *Ibid.*

[245] *McClenaghan v. Perkins* (1903), 5 O.L.R. 129 (C.A.).

[246] [1948] S.C.R. 295, [1948] 3 D.L.R. 657 (subsequent references are to [1948] S.C.R.).

[247] *Ibid.*, at 301 (emphasis in original).

is speaking the truth upon a material issue in the proceedings".[248] Thus, the "corroborating evidence must be independent of the veracity of the party whose evidence requires corroboration".[249] Perhaps the greatest difficulty created by this requirement occurs when the need for corroboration forces the exclusion of documentary evidence that would otherwise be corroborative, but is unacceptable in the particular circumstances because the documentary evidence can be proved only by the person whose own evidence must be corroborated.[250]

The corroborative evidence might consist of circumstantial evidence, although, to be corroborative, the circumstances must be consistent only with the evidence requiring corroboration.[251] If the circumstances are consistent with the theories of both parties, they can be corroborative of neither.[252]

Finally, once the evidence of an opposite or interested party has been corroborated, the trier of fact must weigh the evidence in the ordinary manner.[253]

There have been a number of expressions of judicial dissatisfaction with the statutory requirement, criticizing the section on the basis of both substance[254] and principle.[255] Indeed, there would appear to be a judicial

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[248] *Sands Estate v. Sonnwald* (1986), 9 C.P.C. (2d) 100 (H.C.J.), at 119.

[249] Sopinka and Lederman, *supra*, note 242, at 417.

[250] *Ibid.*

[251] *McTaggart v. Boffo* (1975), 10 O.R. (2d) 733, 64 D.L.R. (3d) 441 (H.C.J.).

[252] *Ibid.*

[253] Sopinka and Lederman, *supra*, note 242, at 418.

[254] See, for example, *Kudlaciak v. Trela* (1975), 11 O.R. (2d) 330, at 341, 66 D.L.R. (3d) 72, at 83 (H.C.J.), where the following appears:

> What has already been said is enough to dispose of the issue of corroboration in the present case. However, having had to consider the relevant case law it might be permissible to add some observations which are purely *obiter*. In *Ryan v. Whitton, supra*, Gale, J., discussed some of the authorities and difficulties raised by them. At p. 101 O.R., p. 149 D.L.R., he said:
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> > On those authorities, therefore, it would be my conclusion that if there is evidence corroborating or tending to corroborate evidence of the plaintiff in an action of this kind on some of the material issues which have been raised by the pleadings the purpose of the Act has been satisfied, although, I repeat, the Court may thereby be given little or no assistance in its endeavour to decide the veracity of the plaintiff on the matters that are in dispute.
>
> There is considerable support for that view in some of the cases cited by Gale, J., and by me. If it is a correct statement of the law, s. 14 [now s. 13] fails to achieve its purpose. However, any helpful clarification of this very unsatisfactory area of the law will have to await some matter in which the construction of s. 14 is directly in issue.

[255] See, for example, *Sands Estate v. Sonnwald, supra*, note 248, at 109-10, where the following appears:

> Whilst the inflexibility of a rule abrogating the general principle of the common law

trend toward a strict interpretation of the section, deriving from the more general reluctance on the part of courts to require corroboration in any matter, preferring, instead, to rely on an assessment of the credibility of the evidence.[256] The section has also been the subject of criticism by commentators. For example, the rule has been said to be misguided, for the following reasons:[257]

> In the first place, it favors the dead above the living, for it would rather see an honest survivor unjustly lose his claim than an honest decedent be made unjustly to pay; yet, the equities being equal, the living person should rather be favored.
>
> In the next place, it is based on a mere contingency—the contingency that the claim will be dishonest and that there will be no means of exposing its dishonesty; and so, for the sake of defeating the dishonest man who may arise, the rule is willing to defeat the much more numerous honest men who are sure to possess just claims.
>
> Finally, there is always an abstract impropriety and injustice in any rule which interposes a technicality to prevent judicial action upon testimony which is in fact completely believed and trusted.

Finally, it appears that the statutory provision has been abandoned in a number of contexts. British Columbia, for example, has abrogated the rule,[258] and the *Uniform Evidence Act*[259] has adopted the same position.[260]

It should be noted that the Commission, in its *Report on the Law of Evidence*,[261] retained the equivalent of section 13 in the Draft Act appended to the report.[262] It was retained, however, without comment. Having considered the provision in the present context, the Commission is of the view that the rule has outlived its usefulness. Even in the absence of the compelling criticisms outlined above, if it could be argued legitimately that the rule is

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> that the testimony of a single witness, no matter what the issue nor who the person, may legally suffice in proof of the issues to which such evidence relates, may rightly be criticized . . . it nonetheless remains an integral part of the adjectival law applicable in cases such as the present. It would seem particularly incongruous to visit upon a party responding to a claim initiated on behalf of a deceased person a synthetic rule denying such respondent relief, notwithstanding belief, in the absence of corroboration.

256 See *Ken Ertel Ltd. v. Johnson* (1986), 53 O.R. (2d) 220, at 223, 25 D.L.R. (4th) 233 (Div. Ct.).

257 Chadbourn (ed.), *Wigmore on Evidence in Trials at Common Law* (1978), Vol. 7, §2065, at 488.

258 Section 11 of the *Evidence Act*, R.S.B.C. 1960, c. 134 was repealed by S.B.C. 1976, c. 2, s. 20(a).

259 Uniform Law Conference of Canada, *Proceedings of the Sixty-Third Annual Meeting* (1981), at 52, and Appendix U, at 326.

260 *Uniform Evidence Act, ibid.*, s. 125.

261 Ontario Law Reform Commission, *Report on the Law of Evidence* (1976).

262 *Ibid.*, Appendix A, s. 19.

a justified protection against the temptation of unchallengeable perjury, the present technical complexity, and the exclusions from its application, combine to call its value into question. We find persuasive the argument, alluded to above, that to the extent a problem exists, it can be dealt with most appropriately by the court assessing the credibility of the evidence. Accordingly, we recommend that section 13 of the *Evidence Act*, requiring corroboration in an action by or against estates, should be repealed.

7. BONDING OF ESTATE TRUSTEES

Traditionally, administration bonds have been required to provide protection for claimants and beneficiaries of an estate against a defalcating personal representative. Section 60 of the *Estates Act*[263] provides:

> 60. Except where otherwise provided by law, every person to whom a grant of administration, including administration with the will annexed, is committed shall give a bond to the judge of the court by which the grant is made, to enure for the benefit of the Accountant of the Ontario Court, with a surety or sureties as may be required by the judge, conditioned for the due collecting, getting in, administering and accounting for the property of the deceased, and the bond shall be in the form prescribed by the surrogate court rules, and in cases not provided for by the rules, the bond shall be in such form as the judge by special order may direct.

While the posting of a bond is generally not required of executors, section 25 of the *Estates Act* imposes such an obligation in limited circumstances. Section 25 provides as follows:

> 25. Letters probate shall not be granted to a person not resident in Ontario or elsewhere in the Commonwealth unless the person has given the like security as is required from an administrator in the case of intestacy or in the opinion of the judge such security should under special circumstances be dispensed with or be reduced in amount.

In addition to the above sections, the Act and rules[264] contain numerous provisions respecting the bonding requirement, which may be summarized as follows:

1. The amount of the bond must be double the amount or value of the assets of the estate for probate purposes,[265] and the judge may investigate the value of the estate property, in a summary way, if he doubts the declaration of the applicant.[266]

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[263] *Supra*, note 169, as am. by S.O. 1989, c. 56, s. 48(19).

[264] *Supra*, note 183.

[265] *Estates Act, supra*, note 169, s. 62(1).

[266] Estates Rules, *supra*, note 183, r. 36.

2. The bond must be the bond of a guarantee company or a personal bond and, in the case of a personal bond, the court may require the surety to attend before it for examination.[267]

3. Any person with an interest in the estate may, by memorandum, require that notice be given to him of any consideration of the bond by the court, and thereby obtain the opportunity to inquire into its sufficiency.[268]

4. A single surety is sufficient where the value of the estate is $5,000 or less; but where the value of the estate property exceeds $5,000, at least two sureties are required, unless the judge otherwise directs.[269] If, after the grant has issued, the judge concludes that the sureties are insufficient, the judge may require further security.[270]

5. Where there is a personal bond, the surety must be at least eighteen years old.[271] No registrar or solicitor may be a surety under an administration bond.[272]

6. Security is not necessary where the administration is undertaken by the Government of Ontario, any ministry thereof, or any provincial commission or board.[273]

7. Where there are special circumstances, the judge may reduce the amount of the bond or dispense with the bond entirely.[274] A bond is not required where administration is granted to a surviving spouse, and (a) the net value of the estate does not exceed $75,000, and (b) the spouse files an affidavit setting forth the debts of the estate.[275]

8. The form of the bond is prescribed in the rules.[276]

In order to satisfy the terms of the administration bond the personal representative must (1) make an accurate inventory of the estate; (2) administer the estate as required by law, paying all proper debts and claimants

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[267] *Ibid.*, r. 33.

[268] *Ibid.*, r. 35(1).

[269] *Ibid.*, r. 34(2).

[270] *Estates Act, supra*, note 169, s. 65, and Estates Rules, *supra*, note 183, r. 37.

[271] *Ibid.*, r. 34(1).

[272] *Ibid.*, r. 34(4).

[273] *Estates Act, supra*, note 169, s. 61(1).

[274] *Ibid.*, s. 62(2).

[275] *Ibid.*, s. 61(2).

[276] Estates Rules, *supra*, note 183, Appendix A, Forms 19, 20 and 22.

and properly marshalling the assets; (3) make an accounting of the administration; and (4) pay the residue to the persons entitled.[277]

When an administrator has fulfilled her obligations under the terms of the bond, to the satisfaction of the court, the bond may be delivered up for cancellation, either after the administrator has passed her final account,[278] or upon presentation of evidence satisfactory to the court that the debts have been paid and the residue of the estate distributed.[279] In the latter case, notice must be given to the Official Guardian or the Public Trustee if an infant or mental incompetent, respectively, is entitled to a part of the estate. The procedure under section 68 for an order discharging a bond where the administrator has not passed her accounts "is followed in many cases, as it obviates the necessity of passing accounts the expense of which is often not justified: in many cases all beneficiaries are anxious that the surety be released and are glad to consent".[280]

It was noted above that section 60 requires that the bond "enure for the benefit of the Accountant of the Ontario Court". A claimant against an administrator who wishes to realize on a bond must obtain an assignment of the bond from the court. Upon application, the court may, in a summary way, assign the bond to the claimant where the court is satisfied that a condition of the bond has been broken.[281] The claimant may then sue on the bond, in her own name, and recover as trustee for all persons with claims in respect of the breach of condition.[282]

The assignment procedure enables the court to maintain discretionary power over the use of administration bonds. A number of requirements have evolved respecting the exercise of this discretion, as follows:[283]

> The application for an order to assign the bond should be on notice to the sureties. . . .
>
> The procedure for assignment of the bond does not offer a creditor an alternative method of collecting his debt; he must first exhaust his normal remedies.
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> On an application for assignment of the bond the applicant need make out only a *prima facie* case. On such an application a contention that the condition

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[277] Hull and Cullity, *supra*, note 170, at 249. See, also, Estates Rules, *supra*, note 183, Appendix A, Form 19, which also includes a condition that the administrator will deliver up the letters of administration if a will of the deceased is later proved.

[278] *Estates Act, supra*, note 169, s. 67.

[279] *Ibid.*, s. 68, reproduced, in part, *supra*, note 188.

[280] Hull and Cullity, *supra*, note 170, at 251-52.

[281] *Estates Act, supra*, note 169, s. 63.

[282] *Ibid.*

[283] Hull and Cullity, *supra*, note 170, at 249-50.

> of the bond is, in part, invalid will not be considered. But the Court has discretion to refuse to direct the assignment if the proceedings appear to be wholly frivolous or vexatious.

In modern practice, administration bonds are usually secured, for a fee, from a surety company. The cost of an administration bond is increased by the requirement in section 62(1) of the Act that the amount of the bond must be double the amount of the sworn value of the property of the estate. While the costs of administration are increased by the necessity of obtaining a bond, it is quite rare for proceedings to be taken for enforcement. Indeed, none of the many practitioners or court officials consulted in connection with this project had any experience with the realization of administration bonds.

Earlier in this report we recommended that the offices of executor and administrator should be assimilated.[284] In accordance with that general proposition, we believe that a single rule respecting bonding should apply in respect of all estate trustees. We have reached this conclusion not only as a matter of theoretical consistency, but also as a matter of principle. In our view no principled rationale can be advanced for a rule that would require a close relative who is an administrator to obtain a bond, but would not require a stranger who is an executor to do so. Accordingly, if the Commission were to recommend the continuation of the general bonding requirement, it would be necessary, in our view, to extend that requirement to all estate trustees. The result of such a proposal, if all estate trustees were to be bonded through surety companies, would be a substantial increase in the business of surety companies, and a corresponding increase in the present dissatisfaction with the high cost of bonding.

There would appear to be a modern trend, evidenced in a number of jurisdictions, away from a general bonding requirement. For example, section 3-603 of the United States Uniform Probate Code[285] provides as follows:

> 3-603. No bond is required of a personal representative appointed in informal proceedings, except (1) upon the appointment of a special administrator; (2) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond or (3) when bond is required under Section 3-605 [demand for a bond by an interested person]. Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the Court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the Court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

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[284] *Supra*, ch. 2, sec. 1(d).

[285] *Supra*, note 108.

In England, pursuant to the recommendations of the Law Commission,[286] administration bonds, and the general requirement for sureties, were abolished in 1971.[287] The English Law Commission recommended that, while administration bonds should be abolished, the power should be retained to require a guarantee by sureties for the due performance of the administrator's duties on any application for a grant to the following persons:[288]

(a) a creditor as such,

(b) a person having no immediate beneficial interest in the estate,

(c) an attorney of a person entitled to a grant,

(d) a person to the use and benefit of a minor or of someone incapable of managing his own affairs,

(e) a person who appears to the Registrar to be resident outside the United Kingdom, the Channel Islands, or the Isle of Man or where the Registrar considers that there are special circumstances making it desirable to require sureties.

A similar approach has been recommended in Western Australia,[289] South Australia,[290] and Victoria.[291]

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[286] England, The Law Commission, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Law Com. No. 31 (Cmnd. 4497, 1970) (hereinafter referred to as "English Report"), paras. 12-14, at 7-9.

[287] *Supreme Court of Judicature (Consolidation) Act 1925*, c. 49, s. 167, as am. by *Administration of Estates Act 1971*, c. 25, s. 8, rep. by *Supreme Court Act 1981*, c. 54, s. 152(4) and Sch. 7. See, now, *Supreme Court Act 1981*, s. 120, and Non-Contentious Probate Rules 1954, S.I. 1954/796, r. 38, as en. by S.I. 1971/1977, and am. by S.I. 1982/446 and S.I. 1985/1232.

[288] English Report, *supra*, note 286, para. 14, at 8-9.

[289] Law Reform Commission of Western Australia, *Report on Administration Bonds and Sureties*, Project No. 34, Pt. II (1976).In addition to the circumstances in which the English Report, *supra*, note 286, would require a surety, the Western Australia *Report on Administration Bonds and Sureties* would require a surety in the following circumstances (para. 22, at 12-13):

(a) where the grant of administration is limited, for example, *ad colligenda bona* or *ad litem*;

(b) where one or more of the beneficiaries are not of full age or capacity; and

(c) where one or more of the beneficiaries are not resident in Western Australia and they have no agent or attorney in that state.

[290] Law Reform Committee of South Australia, *Twenty-Second Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Administration Bonds and to the Rights of Retainer and Preference of Personal Representatives of Deceased Persons* (1972). The South Australia Report adopts most of the recommendations contained in the English Report, *supra*, note 286. However, while it would retain the use of administration bonds, the use of both administration bonds and sureties would be restricted.

[291] Victoria, Chief Justice's Law Reform Committee, *Report of Sub-Committee Re Administration Bonds* (1971).

In general, we agree with the direction of these reform proposals, and have concluded that there should be no general bonding requirement for estate trustees in Ontario. As we indicated above, the present requirement adds unnecessarily to the costs of administration, and it would be unjustifiable, in our view, to extend the present requirement to apply to all estate trustees.

However, we have also concluded that bonding should be required only in limited circumstances. For example, in view of the difficulties associated with obtaining and enforcing a judgment outside the jurisdiction, estate trustees who are not resident in Ontario should be bonded. On the other hand, bonding should not be required if any one of the estate trustees is resident in Ontario. The Commission recommends, therefore, that no bond should be required of a recipient of an estate trustee certificate unless,

(a) the recipient of, or all of the recipients of, an estate trustee certificate are nonresidents of the Province of Ontario;

(b) the recipient applied for an estate trustee certificate solely in her capacity as a creditor of the estate;

(c) the court has ordered the posting of a bond; or

(d) the will requires the posting of a bond.

The Commission further recommends that, notwithstanding the above recommendation, the court should be able to dispense with the necessity of posting a bond in any situation where it determines that the posting of a bond is not necessary or where the beneficiaries and a majority of the creditors (by value) concur.

As we indicated earlier, section 61(1) of the *Estates Act* provides that security is not required of the Government of Ontario, or any of its ministries or agencies. We recommend that section 61(1) be retained. In addition, with respect to the bonding of trust corporations, we recommend that section 175(4) of the *Loan and Trust Corporations Act, 1987*[292] should be retained. Section 175(4) provides as follows:

> 175.—(4) Notwithstanding any rule, practice or statutory provision, it is not necessary for a trust corporation approved under subsection (2)[293] to give any

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[292] S.O. 1987, c. 33.

[293] Section 175(2) of the *Loan and Trust Corporations Act, 1987, ibid.*, provides:

> 175.—(2) Where a registered trust corporation is authorized to execute the office of executor, administrator, trustee, receiver, liquidator, assignee, guardian or committee, and the Lieutenant Governor in Council approves of the corporation being accepted as a trust corporation for the purposes of the Supreme Court [now the Ontario Court (General Division)], every court or judge having authority to appoint such an officer may, with the consent of the corporation, appoint the corporation to exercise any of such offices in respect of any estate or person under the authority of such court or judge, or may grant to the corporation probate of any will in which the corporation is named as an executor.

security for the due performance of its duty as executor, administrator, trustee, receiver, liquidator, assignee, guardian or committee unless so ordered by a court.

It would be desirable, in our view, to permit an interested individual to petition the court to require a bond in circumstances in which a bond would otherwise not be required. Similarly, we believe that it would be desirable to permit such a person to request additional protection after a grant has been made. We recommend, therefore, that, either before or after the grant of an estate trustee certificate, any person having an interest in the administration of an estate should be able to apply to the court for an order requiring the posting of a bond or an additional bond by the estate trustee.

Where a person who is required to post a bond fails to do so, we recommend that the court should have the power to revoke the estate trustee certificate, and to make such further order as may be just in the circumstances. While our previous recommendation would permit an application to the court to increase the security, we believe that an application should similarly be permitted to the court to decrease or otherwise vary the terms of a bond. Accordingly, we recommend that an estate trustee, surety, or any person having an interest in the administration of the estate should be able to apply to the court at any time to have the amount of the bond reduced or the terms of the bond varied, or a substitution of the security granted.

It is apparent from a review of the form of bond prescribed by the present rules[294] that the language employed is somewhat archaic. Moreover, it is unclear whether the terms of the bond impose liability on the surety for loss to the estate due to the simple negligence of the personal representative. It is our view that, if the bond is to provide meaningful protection, the law should be clarified to ensure that the liability imposed under the terms of the bond is co-extensive with the liability of the estate trustee. Further, we believe that this should be clearly and expressly stated in the terms of the bond itself, for the benefit of the surety as well as the beneficiary.

A number of the other terms and conditions of the bond should also be addressed. For example, as we noted above, section 60 of the *Estates Act*[295] requires that the bond "enure for the benefit of the Accountant of the Ontario Court". Upon default, a claimant must obtain an assignment of the bond from the court before he can sue on the bond in his own name. This procedure, in our view, is unnecessary. We have concluded that the bond should be stated to enure for the benefit of the persons interested in the administration of the estate.

At present, the amount of the bond must be double the sworn value of the estate.[296] This requirement increases the cost of obtaining the bond and,

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[294] Estates Rules, *supra*, note 183, Appendix A, Form 19.

[295] *Supra*, note 169.

[296] *Estates Act, ibid.*, s. 62(1).

in our view, it does so unnecessarily. It would be a very rare case in which the estate doubles in value after the date of death. We have concluded that the amount of the bond should be equal to the value of the estate, since this is ordinarily the extent of the estate trustee's liability. It should be recalled, however, that the court will have the discretion to increase the security required, if it is warranted in the circumstances. Finally, certain other issues, which are self-explanatory, are addressed in the recommendation that follows. The Commission therefore recommends that a standard and plain language form of bond should be prescribed, the terms and conditions of which should be as follows:

(a) a guarantee given in pursuance of a bonding requirement should enure for the benefit of the beneficiaries, creditors, and other persons interested in the administration of the estate of the deceased as if contained in a contract made by the surety or sureties with every such person, and where there are two or more sureties, as if they had bound themselves jointly and severally;

(b) the bond shall be conditioned on the liability of the estate trustee to the beneficiaries, creditors and other persons interested in the administration of the estate;

(c) the amount of the bond shall be referable to the total value of the assets of the deceased;

(d) the bond shall be filed in the court;

(e) the surety shall be given notice of any proceedings to establish the liability of an estate trustee;

(f) upon a final passing of accounts or where it appears that all liabilities of the deceased have been satisfied the court may authorize the estate trustee to arrange for the cancellation of the bond; and

(g) unless upon order of the court, or with the consent of all the beneficiaries, no bond may be cancelled without notification of the beneficiaries or creditors of the estate.

8. EXEMPTIONS UNDER THE *EXECUTION ACT*

The *Execution Act* provides that certain of a debtor's chattels are exempt from seizure.[297] The Act extends that protection to the debtor's

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[297] Section 2 of the *Execution Act, supra*, note 2, provides as follows:

> 2. The following chattels are exempt from seizure under any writ issued out of any court:
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> 1. Necessary and ordinary wearing apparel of the debtor and his family not exceeding $1,000 in value.
>
> 2. The household furniture, utensils, equipment, food and fuel that are contained in and form part of the permanent home of the debtor not exceeding

spouse and family after the death of the debtor. Sections 5 and 6 provide as follows:[298]

> 5.—(1) After the death of the debtor, chattels exempt from seizure are exempt from the claims of creditors of the debtor.
>
> (2) A surviving spouse is entitled to retain the chattels exempt from seizure for the benefit of the surviving spouse and the debtor's family.
>
> (3) If there is no surviving spouse, the family of the debtor is entitled to the chattels exempt from seizure for its own benefit.
>
> 6. The debtor, the surviving spouse or the debtor's family, or, in the case of minors, their guardian, may select out of any larger number the chattels exempt from seizure.

Several issues arise in connection with these provisions. First, it is not clear whether the exemptions in the Act are available to the surviving spouse or the debtor's family in respect of debts that arise after the death of the deceased. As we noted earlier in this report,[299] a personal representative is personally liable for any debts incurred in the course of the administration, although she has a right to reimbursement from the estate.[300] Thus, while section 5(1) provides that "[a]fter the death of the debtor, chattels exempt from seizure are exempt from the claims of creditors of *the debtor*",[301] as a matter of legal theory, the estate trustee is "the debtor" in respect of debts that arise after the death of the deceased. Of course, as we indicated, she

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> $2,000 in value.
>
> 3. In the case of a debtor other than a person engaged solely in the tillage of the soil or farming, tools and instruments and other chattels ordinarily used by the debtor in his business, profession or calling not exceeding $2,000 in value.
>
> 4. In the case of a person engaged solely in the tillage of the soil or farming, the live stock, fowl, bees, books, tools and implements and other chattels ordinarily used by the debtor in his business or calling not exceeding $5,000 in value.
>
> 5. In the case of a person engaged solely in the tillage of the soil or farming, sufficient seed to seed all his land under cultivation, not exceeding 100 acres, as selected by the debtor, and fourteen bushels of potatoes, and, where seizure is made between the 1st day of October and the 30th day of April, such food and bedding as are necessary to feed and bed the live stock and fowl that are exempt under this section until the 30th day of April next following.

[298] *Ibid.*, s. 5, as en. by S.O. 1986, c. 64, s. 15(2), and s. 6, as am. by S.O. 1986, c. 64, s. 15(3).

[299] *Supra*, ch. 2, sec. 4(a)(ii)a.

[300] We recommended above, *supra*, ch. 2, sec. 4(a)(iii), that an estate trustee should be able to enter into a contract in his representative capacity, in which case the estate trustee would not be personally liable. Claims based on contracts entered into by an estate trustee in his representative capacity would be asserted against the estate.

[301] Emphasis added.

may claim reimbursement from the estate in respect of these expenses. The policy underlying the above sections of the *Execution Act* would seem to require that the exempt chattels remain available for the benefit of the surviving spouse and the debtor's family irrespective of whether the debts arise before or after the death of the deceased. We have concluded, therefore, that it should be made clear that chattels exempt from seizure before the death of the deceased should remain exempt after the death of the deceased, without regard to whether the claims arise prior to or subsequent to the death.

Second, it is not made clear in the *Execution Act* whether funeral and testamentary expenses have priority over the exemptions. The relationship between the exemptions provided in section 5 and funeral and testamentary expenses were discussed in *Re Tatham*.[302] In that case, Meredith C.J. indicated that "[t]he section does not, however, free the exempted goods from liability for the funeral and testamentary expenses; and the exempted goods are therefore liable to satisfy these expenses".[303]

We agree that the exemptions in section 5 of the *Execution Act* should be subject to liability for the funeral and testamentary expenses and the costs of administration. In this case, we have concluded that the interests of ensuring a proper burial for the deceased, and that the estate is fully and properly administered, are paramount.

Finally, there might be some uncertainty whether certain of the chattels exempt from seizure prior to the death of the debtor remain exempt under section 5. Specifically, it might be suggested that the exemption for the debtor's tools of the trade[304] are not exempt after the death of the debtor. This possibility was alluded to, for example, in *Pickering v. Thompson*,[305] where it was stated:[306]

> The right to select exempt chattels is, by sec. 7 [now section 6], given to the debtor, 'his widow or family;' the right to claim $100 in lieu of tools and implements of trade is a right given to the debtor personally;[307] and the distinction may well have been made intentionally. The general exemptions which may be selected are articles used not alone by the debtor, but also by his family. The tools of the debtor's trade are of use to him personally, but are not generally of value to the widow.

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302 (1901), 2 O.L.R. 343 (Ch. Div.).

303 *Ibid.*, at 346.

304 See *Execution Act, supra*, note 2, s. 2, paras. 3 and 4, reproduced *supra*, note 297.

305 (1911), 24 O.L.R. 378 (H.C. Div.).

306 *Ibid.*, at 386-87.

307 See, now, *Execution Act, supra*, note 2, s. 3.

It is the view of the Commission that the debtor's tools of the trade should continue to be exempt after the death of the debtor. Where the exemption relates to farming tools, it is quite possible that the family might be able to use the tools for self-support. For similar reasons, other tools of the trade should continue to be exempt, although we acknowledge that in some cases the tools will not be used to earn a living, but rather will be sold to raise cash. Nevertheless, we are of the view that such chattels should remain available for the continued maintenance and support of the surviving spouse and the debtor's family.

Accordingly, the Commission recommends that the *Execution Act* should be amended to clarify the following:

(a) after the death of the debtor, all property exempt from seizure in the hands of the deceased should remain exempt in the hands of the surviving spouse and the debtor's family, without regard to whether the claims arose prior to or subsequent to the death, or whether they were asserted against the estate trustee and not the deceased; and

(b) expenses for the disposal of the body of the deceased, testamentary expenses and costs of administration, as defined above,[308] should have priority over the exemptions granted in the Act.

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[308] *Supra*, this ch., sec. 2(c). The priorities between these expenses is also discussed *ibid.*

CHAPTER 5

TRANSFER OF ASSETS OF THE DECEASED

1. INTRODUCTION

The most striking feature of the present law dealing with the vesting and disposition of assets of the deceased is that radically different schemes are applicable to real and personal property. With only minor exceptions, the law affecting personal property is free of statutory intervention and is relatively simple. The personal property of a deceased vests in her personal representative, who has a generally unrestricted power of sale over it.[1] There is uncertainty, however, in some aspects of the present law. In particular, there is obscurity about the legal position during the period before the appointment of an administrator under an intestacy or where no executor is appointed by the will. There are also doubts surrounding the power of a personal representative to distribute property in kind[2] to beneficiaries.

The law dealing with the vesting and distribution of real property stands in marked contrast to that affecting personal property. Generally, the powers of sale conferred on personal representatives are restrictive. The law is often obscure and highly complex. The result is that the conveyancing of estate property in Ontario may be unnecessarily complicated and expensive.

One final introductory point should be emphasized. In the case of both real and personal property, testators generally are free to modify the general law by means of express provisions in their wills. Consequently, the obscure, complex, and restrictive general law affecting real property in fact applies only infrequently. Yet when it does so, it tends to be in small estates, where a professionally drawn will is less likely to have been made, and where the delays and costs caused by the general law least can be afforded.

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[1] Even where personal property is specifically given to a beneficiary, this power exists: see discussion, *infra*, this ch., sec. 2(a)(ii).

[2] This is also known as "distribution *in specie*". Throughout this chapter, we shall use the term "distribution in kind".

2. THE PRESENT LAW: PERSONAL PROPERTY

(a) Vesting and Powers of Sale

(i) Vesting

Generally, the law dealing with the vesting of personal property, and with the personal representative's power of sale over it, is clear and straightforward.

At common law, all the personal property owned by the deceased at the time of death vested in his personal representative. Section 2(1) of the *Estates Administration Act*, so far as personalty is concerned, merely codifies that principle.[3]

Where a person dies leaving a will that appoints an executor who accepts the office, the executor derives title from the will itself and the property vests in the executor at the date of the death of the deceased. In such a case, probate of the will does not confer authority; it acts only as a confirmation of the executor's status and, in general, is not essential.[4] By contrast, administrators do obtain their authority from the order of the court appointing them, "and the property of the deceased vests in [them] only from the time of the grant".[5]

Obviously, special treatment is required where there is no executor. In this regard, two doctrines are relevant. The first is as follows:[6]

> The right of succession to the personal estate, before administration was granted, formerly belonged to the ecclesiastical Ordinary in cases of intestacy

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[3] R.S.O. 1980, c. 143. Section 2(1) provides as follows:

> 2.–(1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on his death, whether testate or intestate and notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of his debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.

[4] See, for example, Oosterhoff and Rayner (eds.), *Anger and Honsberger*[:] *Law of Real Property* (2d ed., 1985) (hereinafter referred to as "Anger and Honsberger), Vol. 2, §2905, at 1456.

[5] Sunnucks, Martyn and Garnett, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (1982) (hereinafter referred to as "Williams, Mortimer and Sunnucks"), at 428. See Anger and Honsberger, *supra*, note 4, at 1456.

[6] Hull and Cullity, *Macdonell, Sheard and Hull on Probate Practice* (3d ed., 1981), at 192. In British Columbia, s. 3 of the *Estate Administration Act*, R.S.B.C. 1979, c. 114, provides that "[f]rom and after the decease of a person dying intestate, and until administration is granted in respect of his estate and effects, the personal estate and effects of the deceased person are vested in the court, subject only to the power of a court of competent jurisdiction to grant administration in respect of them".

> or of the inability or refusal of the executor to act, and after the abolition of these Courts, to the Judge of the Court having the grant of probate or administration. It would seem that in Ontario it vests in the Judge of the Surrogate Court, by whom it is delegated to the administrator by the grant of letters of administration.

The second is the doctrine of relation back.[7] This doctrine deals in a limited fashion with the hiatus between the date of death of the deceased and the appointment of an administrator, since it allows certain acts to be done on the basis of the fiction that the title of the administrator "relates back" to the death of the deceased. While the scope of the doctrine is not entirely clear, the theme running through the cases applying it seems to be protection of the estate from wrongful injury and conferring on the estate rights relating to beneficial transactions. For example, the doctrine of relation back renders "valid dispositions of the deceased's property made before the grant, when it is shown that such dispositions are for the benefit of the estate".[8] Another example of the doctrine is that a "promise to pay a debt made to a person assuming to act as administrator, who subsequently obtains letters of administration",[9] will be effective to prevent the debt becoming statute-barred. Rule 9.03 of the rules of court[10] deals with court proceedings. It provides that "[w]here a proceeding is commenced by or against a person as executor or administrator before a grant of probate or administration has been made and the person subsequently receives a grant of probate or administration, the proceeding shall be deemed to have been properly constituted from its commencement".

(ii) Powers of Sale

The sale of personal property is governed by the common law. A personal representative has "an absolute power of disposition over all the personal estate of his testator or intestate"[11] without regard to the fact that it was specifically bequeathed to a beneficiary, and without the need for concurrence of a beneficiary.[12] A purchaser takes title free and clear of the rights of any beneficiary or creditor.[13]

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[7] Hull and Cullity, *supra*, note 6, at 210-13.

[8] *Ibid.*, at 210.

[9] *Ibid.*, at 211.

[10] O. Reg. 560/84.

[11] Williams, Mortimer and Sunnucks, *supra*, note 5, at 661.

[12] It does not follow that, because a personal representative has power to give a good title to a transferee, the exercise of that power may not be a breach of trust or *devastavit* for which the personal representative may be personally liable to a beneficiary or creditor. For example, if an executor were to sell personal property that was specifically bequeathed to a beneficiary in a case where there are no debts, he may be liable.

[13] For a statement of the rationale for the treatment of personal property, see *Whale v. Booth* (1784), 100 E.R. 1211 (K.B.), at 1212.

(b) The Manner of Distribution

The law dealing with the powers and duties of a personal representative as to the manner of distribution of property to beneficiaries is obscure. In particular, it is unclear when a personal representative may, and when she must, distribute property in kind.[14] There may, of course, be a provision in the will conferring a power, or even imposing an obligation, on the personal representatives to distribute the property in a particular manner, and such a provision will be effective according to its terms. The difficulties arise on intestacy or where a will has no relevant and clear provision. Part of the difficulty has been caused by the failure of courts and commentators to differentiate three different things:[15] (a) a simple distribution in kind; (b) an appropriation, or allocation in kind, of particular assets to particular beneficiaries; and (c) a distribution to a beneficiary absolutely entitled in possession of an undivided share in pure personalty.

(i) Simple Distribution in Kind

What we are calling a simple distribution in kind occurs where particular property in the estate is distributed in kind to a legatee, and, where there is more than one such legatee, the distribution is made to them as co-owners.

In the case of specific or general legacies in a will, this matter is not problematic. In principle, it is a matter of construction of a will whether such distribution in kind is permitted or required. However, where there is a specific gift,[16] the very nature of the gift requires that the subject-matter of it must be distributed in kind to the legatee or legatees, if it is not required to be sold for the purpose of payment of debts and taxes or administration, testamentary, and funeral expenses.[17] An example of such a gift would be: "I give my antique diamond necklace to A". A pecuniary legacy, which is a general legacy[18] of an amount of money, such as "I give $10,000 to B", on the other hand, does not identify any particular asset in the estate and, by its nature, is satisfied by payment of the required amount of money. Other general legacies will ordinarily give the personal representative the choice

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[14] Cullity and Brown, *Cullity, Forbes and Brown* [:] *Taxation and Estate Planning* (2d ed., 1984), at 325-27; Brulé, "Specie Distribution in Estates" (1976), 3 E.T.Q. 28; and Holland, "Annotation—Distribution of Specie of Residuary Personalty" (1982), 10 E.T.R. 261.

[15] See, for example, *Lloyds Bank Plc v. Duker*, [1987] 1 W.L.R. 1324, [1987] 3 All E.R. 193 (Ch. Div.).

[16] "A specific testamentary gift is a gift of an identifiable property or object which the testator has described with sufficient particularity to distinguish it from his or her general estate": Oosterhoff, *Text, Commentary and Cases on Wills and Succession* (3d ed., 1990), at 424.

[17] *Re Leblanc* (1978), 18 O.R. (2d) 507, at 512-13, 83 D.L.R. (3d) 151 (C.A.).

[18] "A general legacy is one payable out of the general assets of the estate. Thus, it is not a gift of an identified article owned by the testator, nor is it a direction to pay moneys out of a specific fund. Rather, it is a direction to the personal representatives to pay or transfer the assets described to the legatee": Oosterhoff, *supra*, note 16, at 418.

whether to distribute the amount of property given or to pay the value of it. An example of such a legacy would be: "I give 10,000 common shares in ABC Ltd to C". The personal representatives may either go into the market and buy the required shares and transfer them to the legatee (or, in the event that the estate happens to own the number of shares in question, they may simply transfer those shares), or they may pay to the legatee the amount of money required to buy the shares.[19]

The law affecting residuary gifts and entitlements on intestacy, however, is unclear. The Ontario position appears to be that, in the absence of a provision in the will or agreement by the beneficiaries, it is the duty of a personal representative to convert—that is, sell—the residuary estate and distribute the net proceeds in the form of cash. This position, however, rests on tenuous authority: a dictum and a decision of a single judge on a motion. In *Re Bucovetsky*, Mr. Justice Hope offered the following observation as *obiter dicta*:[20]

> [I]t might not be amiss to remark that it would appear to be incontrovertible that failing a specific direction in the will, and failing the unanimity of all beneficiaries who might be entitled to share in the distribution, the executors would not be entitled to distribute in specie but only after conversion.

For this statement of the law, Hope. J. relied on the leading Ontario case of *Re Harris*.[21] Because of the importance of this case to understanding our conclusions about the uncertainty of the Ontario law governing simple distribution in kind and its bearing upon the law governing the third type of distribution we shall discuss—a distribution to a beneficiary absolutely entitled in possession to an undivided share in pure personalty—it is necessary to review this decision in some detail.

Re Harris concerned the estate of an intestate who was survived by a widow and four children, two of whom were infants. The assets of the estate included 2,994 out of 3,000 shares in a company. Although the shares were apparently of considerable value, they were not readily marketable, and a winding-up of the company would have caused considerable loss. The members of the testator's family differed about what should be done with these shares: the widow and the adult son desired the administrator to give them the shares that would be coming to them upon a distribution, which was one-half of them; the adult daughter opposed a partition of the shares, preferring them to be held by the administrator "until a realisation can take place at a fair price".[22] The administrator sought the advice and direction of the court. Middleton J. held that it was "the duty of the trustee to refuse to transfer any portion

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[19] For a discussion of specific and general legacies, see Williams, Mortimer and Sunnucks, *supra*, note 5, at 894-95. See, also, *Re Millar* (1927), 60 O.L.R. 434, [1927] 3 D.L.R. 270 (H.C. Div.).

[20] [1942] O.W.N. 618, at 620, [1943] 1 D.L.R. 208 (H.C.J.).

[21] (1914), 33 O.L.R. 83, 22 D.L.R. 381 (H.C. Div.) (subsequent references are to 33 O.L.R.).

[22] *Ibid.*, at 85.

of the stock to the beneficiaries, unless all agree".[23] In coming to this conclusion, Middleton J. held that the assets of the estate were subject to a duty of conversion. In deciding this, she equated the position with that of the residue of an estate subject to an express trust for conversion:[24]

> [A]s soon as debts have been paid the administrator holds the estate in trust to convert and divide among those entitled under the statute to distribution, in precisely the same way that an executor holds an estate in trust under a will when he is directed to convert and distribute among several residuary devisees.

For this view, he relied on the judgment of Lord Cairns L.C. in *Cooper v. Cooper*.[25]

However, Lord Cairns L.C.'s judgment is tenuous support at best.[26] It was not directly concerned with this issue: the judgment dealt with the application of the doctrine of election to a share of an intestate's estate. While, in the course of his reasons, Lord Cairns L.C. did discuss the nature of the interest of an intestate successor and did liken it to that of the interest of a residuary legatee under a will, he did not make any reference to such residue being subject to a trust for conversion. In fact, his treatment of this matter is quite ambiguous. Nevertheless, he probably did not intend to affirm that the personal representative's obligation is *prima facie* distribution in the form of money. Indeed, in England the judgment of Lord Cairns L.C. is interpreted to have an opposite effect so that "[u]nless there is a direction in the will requiring conversion into money or such conversion is necessary in the course of administration, or for distribution, the actual residue should be conveyed in its unconverted state".[27]

(ii) Appropriation, or Allocation in Kind, of Particular Assets to Particular Beneficiaries

Appropriation of particular assets to particular beneficiaries gives rise to special concerns.[28] For example, assume that the residue of an estate has been given to A and B equally and, after payment of debts, legacies and

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[23] *Ibid.*, at 88.

[24] *Ibid.*, at 86.

[25] (1874), L.R. 7 H.L. 53, [1874-80] All E.R. Rep. 307.

[26] There are also difficulties with Middleton J.'s treatment of the third matter we discuss, a distribution to a beneficiary absolutely entitled in possession to an undivided share in pure personalty. See *infra*, this ch., sec. 2(b)(iii).

[27] Williams, Mortimer and Sunnucks, *supra*, note 5, at 841. This general principle was accepted in *Lloyds Bank Plc v. Duker*, *supra*, note 15, but it was held to give way to the special circumstance that distribution of shares giving the beneficiary a controlling interest in a company would give that beneficiary more than he was entitled to. The shares were ordered to be sold and the proceeds distributed.

[28] We have been unable to find any Ontario case dealing with this topic. Baker, *Widdifield on Executors' Accounts* (5th ed., 1967), at 138-39 and 299-300, assumes the existence of a body of law conferring powers of appropriation on executors, and cites some of the relevant

funeral, testamentary, and administration expenses, the residue of the estate comprises various assets, including some antique furniture. Beneficiary A states that she would like the furniture to be included in her share of residue. The exercise of such a power by a personal representative has a greater impact on the interests of the beneficiaries than does a simple distribution in kind since, as in the example given, it will often require a selection of assets to be made and a value to be placed on the assets selected. In a family context, depending on the types of asset from which a selection is to be made, this may be a very sensitive matter.

Notwithstanding the potential difficulties, appropriation is allowed by the common law in certain circumstances:[29] for example, "[w]here a share of residue is immediately payable the executor may enter into an arrangement with the legatee to take over a particular asset in satisfaction of his legacy either in whole or pro tanto without obtaining the consent of the other residuary legatees; and if the transaction is a fair one, and the legatee does not receive more than his share of the assets, the appropriation is unimpeachable".[30]

In the context of estates, appropriation of the asset is normally followed immediately by its distribution to the beneficiary so that the two steps of appropriation and distribution are indistinguishable. By contrast, in the case of an ongoing trust, the assets that are the subject of appropriation continue to be be held in trust for beneficiaries, and are not distributed.

(iii) Distribution of Share to an Absolutely Entitled Beneficiary

A line of English cases[31] appears to establish that a beneficiary who is absolutely entitled in possession[32] to a share of residue[33] can generally require that her share be distributed to her "even though other shares

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English cases. In *Re McCarthy* (1981), 10 E.T.R. 261 (P.E.I.S.C.), the court upheld an executor's appropriation of personalty to satisfy the shares of residuary legatees, but no reference was made to relevant principles or authorities.

[29] *Halsbury's Laws of England*, Vol. 17 (4th ed., 1976), paras. 1359-67, at 705-09.

[30] *Ibid.*, para. 1364, at 708.

[31] *Re Marshall*, [1914] 1 Ch. 192, [1911-13] All E.R. Rep. 671 (C.A.); *Re Sandeman's Will Trusts*, [1937] 1 All E.R. 368 (Ch.); *Re Weiner's Will Trusts*, [1956] 1 W.L.R. 579, [1956] 2 All E.R. 482 (Ch.); and *Stephenson v. Barclays Bank Trust Co. Ltd.*, [1975] 1 W.L.R. 882, [1975] 1 All E.R. 625 (Ch. D.). This line of cases was referred to with approval by Gray J. in *Re Campeau Family Trust* (1984), 44 O.R. (2d) 549, 4 D.L.R. (4th) 667 (H.C.J.), aff'd (1984), 50 O.R. (2d) 296 (C.A.), although he treated it as an extension of the rule in *Saunders v. Vautier* (1841), 49 E.R. 282, aff'd 41 E.R. 482. For criticism, see Paciocco and Krishna, "Re Campeau Family Trust: Two Wrongs Make a Right" (1985-86), 7 E.T.Q. 65.

[32] Paciocco and Krishna, *ibid.*, at 68-72.

[33] The rule is probably not restricted to shares in the residue of an estate. All the cases deal with such shares, but there is no reason in principle why it should be so restricted and authoritative formulations do not limit the rule in this way: see, for example, *Re Marshall*, *supra*, note 31, at 199.

remain settled and are not yet distributable"[34], and even where the residue is subject to a trust for sale.[35] Known as "the rule in *Re Marshall*", this principle is generally considered to apply to pure personalty.[36] It is said to give way to special circumstances.

The status of the rule in *Re Marshall* is uncertain in Ontario. In *Re Harris*,[37] Mr. Justice Middleton considered this decision. While he purported to follow it, the reasoning of the two decisions is at odds. *Re Marshall* held that a person entitled to his share of the residue is entitled to receive it, even though the shares of others remain held in trust, notwithstanding that the will provides that the residue is subject to an express trust for sale. By contrast, *Re Harris* held that a share in an intestate estate is analogous to a share in the residue held on trust for sale, and that consequently a beneficiary entitled to her share is not entitled to an immediate distribution. Such a distribution would be permitted only where the beneficiaries are in agreement or, perhaps where a dissenting beneficiary has objected "manifestly unreasonably and vexatiously".[38] In other words, *Re Marshall* creates a presumption in favour of immediate distribution and *Re Harris* creates a presumption that there will be no distribution until it can be made in favour of all the beneficiaries.[39]

3. THE PRESENT LAW: REAL PROPERTY

(a) Vesting of Real Property

At common law, real property passed directly to the persons to whom it was given by the will or, in the case of intestacy, the heir or heirs. Section 2(1) of the *Estates Administration Act* alters the common

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[34] England, Law Reform Committee, *Twenty-third Report (The Powers and Duties of Trustees)* (Cmnd. 8733,1982) (hereinafter referred to as "Law Reform Committee Report"), para. 3.64, at 32.

[35] *Re Weiner's Will Trusts*, *supra*, note 31, at 486.

[36] Law Reform Committee Report, *supra*, note 34, para. 3.64, at 32.

[37] *Supra*, note 21.

[38] *Ibid.*, at 89.

[39] The actual decision in *Re Harris*, *ibid.*, is not necessarily inconsistent with the rule in *Re Marshall*. The rule is said to defer to "special circumstances" and, in *Re Harris*, Middleton J. did place emphasis on the rift between the family members and the fact that distribution of their portion of the shares to the mother and the son, with the other shares owned by them, would give them a controlling interest in the company.

It should also be noted that there was a trust for sale, and that all concerned agreed that a sale would not be appropriate at that time. Implicitly, then, when a propitious time for the sale would occur, it would not be necessary to postpone the entitlement of one beneficiary until all the other beneficiaries were entitled to share in the estate.

Re Harris should be contrasted with *Re Sandeman's Will Trusts*, *supra*, note 31, and *Re Weiner's Will Trusts*, *supra*, note 31. Each held that the fact that distribution would cause

law[40] by providing for the vesting of real property of the deceased in her personal representative, except for real property that person has a right to take by survivorship.

We have previously mentioned, in relation to the vesting of personalty,[41] that property vests in administrators at the time of the grant, and that the present law attempts to deal with the resulting hiatus between death and the grant of administration by two methods: first, by vesting the property of the deceased in the judge and, second, by the doctrine of relation back. The latter doctrine applies to realty as well. The former doctrine, however, is not securely established even in relation to personal property, although it has been suggested that it should also apply to realty in Ontario.[42]

The present system in Ontario does not entirely get rid of the common law idea of title passing directly from the deceased—whether dying testate

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the trustees to lose control of a company was not a sufficient special circumstance, which would justify not making an immediate distribution to the person absolutely entitled in possession to her share of the residue.

[40] The common law was orginally changed by *The Devolution of Estates Act, 1886*, S.O. 1886, c. 22. The Act vested all property—real, as well as personal—in the personal representative, and gave personal representatives the same powers over real property as they had over personal property save that, where infants were interested in the land, a sale or conveyance of the land required approval of the Official Guardian or an order of the court. Except for this qualification, the Act gave personal representatives an unrestricted power to deal with real property so that they were able to confer a good title on a good faith purchaser.

In 1891, this simple scheme was changed by *An Act respecting the Sale of Real Estate by Executors and Administrators*, S.O. 1891, c. 18. This Act re-affirmed the basic principles of the 1886 legislation. It expressly asserted the legislation's applicability where personal representatives sold for the purpose of distributing the estate among beneficiaries, as well as when they sold for payment of debts. It confirmed the inviolable position of a good faith purchaser obtaining title under the Act, whether by purchase from the personal representative or from a beneficiary in whom title had been vested by the personal representatives. Purchasers would take the real estate free of the debts and liabilities of the deceased "not specifically charged thereon otherwise than by his will" (s. 5).

The 1891 Act also introduced two concepts that continue to be a part of Ontario law. The first is the concept of automatic vesting, coupled with the system of cautions. The real property was to remain vested in the personal representative for only 12 months, after which period it would automatically vest in the beneficiaries without any conveyance or other action by the personal representatives unless a caution were registered. The effect of registering the caution was to delay vesting for 12 months from the date of registration. The second concept was the distinction between a sale for the purpose of paying debts and a sale for the purpose of distribution. In the latter case, a sale could not be made against the wishes of non-concurring beneficiaries unless the Official Guardian approved of it.

The *Devolution of Estates Act* was amended on several occasions, most notably in 1910, 1927, and 1930. For discussion, see Denison, "Conveyances under the Ontario Devolution of Estates Act" (1937), 15 Can. Bar Rev. 516. These amendments were attempts to mediate among the conflicting interests of creditors, beneficiaries, and good faith purchasers for value. The result is the present *Estates Administration Act*, *supra*, note 3, a statute of extraordinary complexity that is bereft of a unifying rationale.

[41] *Supra*, this ch., sec. 2(a)(i).

[42] Hull and Cullity, *supra*, note 6, at 192.

or intestate—to the persons beneficially entitled. Section 9(1) of the *Estates Administration Act*[43] provides that the real property automatically vests in the persons beneficially entitled if it has not been disposed of or distributed within three years and if a caution has not been registered by the personal representative:

> 9.—(1) Real property not disposed of, conveyed to, divided or distributed among the persons beneficially entitled thereto under section 17 by the personal representative within three years after the death of the deceased[44] is, subject to the *Land Titles Act* in the case of land registered under that Act and subject to subsections 48(3) and (5) of the *Registry Act*,[45] and subject as hereinafter provided, at the expiration of that period, whether probate or letters of administration have or have not been taken, thenceforth vested in the persons beneficially entitled thereto under the will or upon the intestacy or their assigns without any conveyance by the personal representative, unless such personal representative, if any, has registered, in the proper land registry office, a caution in Form 1 under his hand, and, if a caution is so registered, the real property mentioned therein does not so vest for three years from the time of the registration of the caution[46] or of the last caution if more than one was registered.[47]

This system of automatic vesting in beneficiaries does enable title to be made out without the need for any conveyance or other act by the personal representative; indeed, it enables title to be made out even where no personal representative is appointed and, it is generally considered, where any will that may exist has not been admitted to probate.[48]

This system of vesting is, however, qualified in three main ways. First, the personal representative is allowed to register a caution even after the expiry of the three year period on the terms provided by section 11 of the

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[43] *Supra*, note 3.

[44] In 1902, *An Act to further amend the Devolution of Estates Act*, S.O. 1902, c. 17, provided that automatic vesting would take place 3 years after death. The original period for automatic vesting was 1 year from the date of death: see note 40, *supra*.

[45] Section 48(3) and (5) of the *Registry Act*, R.S.O. 1980, c. 445, deals with consent to a transaction required in some cases from the Minister of Revenue and with the issuing by the Minister of a certificate with respect to the payment of succession duties.

[46] The further postponement created by the registration of a caution remained as 1 year from the date of registration until 1933, when *The Statute Law Amendment Act, 1933*, S.O. 1933, c. 59, s. 16(1), provided that the registration of a caution postponed vesting for a period of 3 years.

[47] Section 9(6) of the *Estates Administration Act*, *supra*, note 3, makes it clear that a caution may be renewed from time to time.

[48] *Re Hollwey and Adams* (1926), 58 O.L.R. 507, [1926] 2 D.L.R. 960 (H.C. Div.); *Re Dennis and Lindsay* (1927), 61 O.L.R. 228, [1927] 4 D.L.R. 848 (H.C. Div.); *Re National Trust Co. Ltd. and Mendelson*, [1941] O.W.N. 435, [1942] 1 D.L.R. 438 (H.C.J.); and *Re Pickles and Johnson*, [1942] O.R. 246 (H.C.J.). It should be noted that the statutory power of sale provided by s. 17 of the *Estates Administration Act*, *supra*, note 3, is circumscribed by the requirement that "an executor shall not exercise the powers conferred by this section until he has obtained probate of the will except with the approval of a judge": *ibid.*, s. 17(7).

Act. These include the requirements that there be obtained either the written consent of all adult beneficiaries and of the Official Guardian on behalf of minor and mentally incompetent beneficiaries whose property or interest would be affected[49] or, alternatively, an order of the court or certificate of the Official Guardian.[50] The effect of the registration of a caution under section 11 is as follows:[51]

> 11.—(3) Where a caution is registered or reregistered under this section, it has the same effect as a caution registered within the proper time after the death of the deceased and of vesting or revesting, as the case may be, the real property of the deceased in his personal representative, save as to persons who in the meantime have acquired rights for valuable consideration from or through a person beneficially entitled, and save also and subject to any equities of any non-consenting person beneficially entitled, or of a person claiming under him, for improvements made after the time within which the personal representative might, without any consent, order or certificate, have registered or reregistered a caution, if his real property is afterwards sold by the personal representative.

The second way that automatic vesting in the beneficiaries is qualified is that, save for protection conferred on a good faith purchaser for value without, it seems, notice of the creditor in question, the property remains liable for the debts of the deceased. In addition, the beneficiary who sells to a good faith purchaser for value is personally liable for the deceased's debts to the extent of the proceeds of the property sold.[52]

The third qualification is that this system operates only imperfectly in the context of property registered under the *Land Titles Act*.[53] The concept of automatic vesting is contrary to the basic requirement of the *Land Titles Act* that only a registered owner "is entitled to transfer or charge registered freehold or leasehold land by a registered disposition".[54] The Act provides a scheme for the transmission of title on the death of the registered owner so that, in the case of freehold land, "such person shall be registered as owner . . . as may . . . be appointed by the land registrar, regard being had

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[49] *Ibid.*, s. 11(1)(c).

[50] *Ibid.*, s. 11(1)(d).

[51] *Ibid.*, s. 11(3).

[52] *Ibid.*, ss. 20(2) and 22. The interrelationship of s. 20(2) and s. 22 is not completely clear. First, s. 20(2) extends protection to a "purchaser in good faith and for valuable consideration", whereas s. 22(1) provides an exception for such of the claims of creditors as the purchaser had notice at the time of his purchase. Second, s. 20(2) limits the personal liability of the beneficiary to the extent of the proceeds of the property sold, whereas s. 22(2) refers generally to a claim against the person beneficially entitled.

In addition, a creditor is not prevented from suing the personal representative personally "where [the personal representative] has permitted the real property to become vested in the person beneficially entitled to the prejudice of the creditor": *ibid.*, s. 22(2).

[53] R.S.O. 1980, c. 230.

[54] *Ibid.*, s. 71(1).

to the rights of the several persons interested in the land and in particular to the selection of any such person as for the time being appears to the land registrar to be entitled according to law to be so appointed".[55] If the personal representative has applied for such transmission of title and been registered as owner, under the Land Titles system, it is unnecessary for any caution to be registered in order to prevent the title vesting in those beneficially entitled.[56] Difficulty, it will be appreciated, is caused in the Land Titles system if there is a succession of persons who become owners but die without being registered as owners. Section 83 of the Act confers on the land registrar broad powers to enter the appropriate person as owner in this situation.

(b) Powers of Sale and Distribution Conferred by the *Estates Administration Act*

(i) Sale for the Purpose of Payment of Debts

The power of personal representatives to sell real property for the purpose of paying the debts of the deceased can be found in section 16 and section 17(1) of the *Estates Administration Act*. Section 16 provides as follows:

> 16. Except as otherwise provided in this Act, the personal representative of a deceased person has power to dispose of and otherwise deal with the real property vested in him by virtue of this Act, with the like incidents, but subject to the like rights, equities and obligations, as if the real property were personal property vested in him.

At common law, a personal representative had, and still has, a general power to sell personal property for the purpose of paying debts.[57]

Section 17(1) also refers to the power to sell real property for the purpose of paying debts:

> 17.—(1) The powers of sale conferred by this Act on a personal representative may be exercised for the purpose not only of paying debts but also of distributing or dividing the estate among the persons beneficially entitled thereto, whether there are or are not debts, and in no case is it necessary that the persons beneficially entitled concur in any such sale except where it is made for the purpose of distribution only.

The power to sell real property for the purpose of paying debts is broad and generally unrestricted. Concurrence of those beneficially entitled to the

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[55] *Ibid.*, s. 121.

[56] Lamont, *Real Estate Conveyancing* (1976), at 270.

[57] See, for example, *Reid v. Miller* (1865), 24 U.C.Q.B. 610, at 617 and 622.

estate is not required.[58] Even where infants are beneficially entitled, it is not necessary to obtain the approval of the Official Guardian or the court.[59] Moreover, this wide power extends to a sale that is partly for the payment of debts and partly for distribution.[60]

Purchasers, moreover, are amply protected in the event that the personal representatives have acted improperly: Section 19 of the Act provides as follows:

> 19. A person purchasing in good faith and for value real property from a personal representative in a manner authorized by this Act is entitled to hold it freed and discharged from any debts or liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by his will, and from all claims of the persons beneficially entitled thereto, and is not bound to see to the application of the purchase money.

A good faith purchaser for value is protected so long as the instrument of conveyance purports to be for the payment of debts, as long as she does not have notice to the contrary, and it seems to be established that she is not required to have proof that in fact the conveyance was made for that purpose.[61] In the case of the sale of land under the *Land Titles Act*, it is necessary for the land registrar to be satisfied that the personal representative purporting to be exercising the power is in fact exercising it properly.[62] Consequently, in such a case "there should be an affidavit stating that the sale is necessary in order to pay the debts of the deceased and that it is a bona fide sale for fair market value. In practice a statement to this effect is frequently included in the land transfer tax affidavit".[63]

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[58] *Re Ross and Davies* (1904), 7 O.L.R. 433 (C.A.).

[59] *Re Watson and Major*, [1943] O.W.N. 696, [1944] 1 D.L.R. 228 (H.C.J.), and *Hilliard v. Dillon*, [1955] O.W.N. 621 (H.C.J.).

[60] *Re Ross and Davies supra*, note 58; *Hilliard v. Dillon*, *supra*, note 59; and *Re Kinross Mortgage Corp. and Central Mortgage and Housing Corp.* (1979), 22 O.R. (2d) 713 (H.C.J.).

[61] Howland, "The Sale of Lands of a Deceased Owner", 1951 *Special Lectures of the Law Society of Upper Canada*[:] *Conveyancing and Real Property* (1951) 57, at 61-62, and Lamont, *supra*, note 56, at 276. See, also, Porter, "Case and Comment – Administration of Estates" (1940), 18 Can. Bar Rev. 799, at 800. *Re McCutcheon and Smith*, [1933] O.W.N. 692 (C.A.), rev'g [1933] O.W.N. 413 (H.C.J.), has been cited for this proposition: see Lamont, *supra*, note 56, at 176. However, that case dealt with a sale under s. 47(5) of *The Trustee Act*, R.S.O. 1914, c. 121, which provided that "[p]urchasers . . . shall not be bound to inquire whether the powers conferred by this section, or any of them, have been duly and correctly exercised by the person acting in virtue thereof". See, now, *Trustee Act*, R.S.O. 1980, c. 512, s. 4(2).

[62] Lamont, *supra*, note 56.

[63] Lamont, *ibid.*, at 276. See, also, "Land Titles Procedural Guide"(1986), in *CCH Ontario Real Estate Law Guide*, Vol. 1, ¶33125, at 5536.

(ii) Sale for the Purpose of Distribution

The *Estates Administration Act* deals with sales of real property by a personal representative for the purpose of distribution of the proceeds to those persons beneficially entitled. The provisions, however, are complex and cumbersome.

Section 17(1), which we have quoted above, recognizes the general power. Section 17(2) sets out a basic restriction, and then subjects it to complex qualifications. The basic restriction is that a sale for the purpose of distribution is not "valid as respects any person beneficially entitled thereto unless he concurs therein".[64] The first qualification to this is that a sale is binding on a non-concurring beneficiary where there is obtained "the approval of the majority of the persons beneficially entitled thereto representing together not less than one-half of all the interests therein, including the Official Guardian acting on behalf of a minor or mentally incompetent person". The second qualification is expressed as follows:

> 17.—(2) [W]here a mentally incompetent person is beneficially entitled or where there are other persons beneficially entitled whose consent to the sale is not obtained by reason of their place of residence being unknown or where in the opinion of the Official Guardian it would be inconvenient to require the concurrence of such persons, the Official Guardian may, upon proof satisfactory to him that the sale is in the interest and to the advantage of the estate of the deceased person and the persons beneficially interested therein, approve the sale on behalf of such mentally incompetent person and non-concurring persons, and any such sale made with the written approval of the Official Guardian is valid and binding upon such mentally incompetent person and non-concurring persons, and for this purpose the Official Guardian has the same powers and duties as he has in the case of minors. . . .

The third qualification under section 17(2) is that the court is given a general, apparently unrestricted, power to dispense with the concurrence of beneficially entitled persons.

Not surprisingly, these complex provisions have given rise to difficulty. Until recently, there was disagreement whether the approval of the Official Guardian, in the absence of the direction of the court, was required in all cases where a minor or mental incompetent is a beneficiary, or only where it was needed to constitute a majority.[65] However, in January, 1991 the Office of the Official Guardian clarified its policy in sales under the *Estates*

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[64] Section 17(1) provides that "in no case is it necessary that the persons beneficially entitled concur in any such sale except where it is made for the purpose of distribution only."

[65] The former position was reflected in Lamont, *supra*, note 56, at 277, and Anger and Honsberger, *supra*, note 4, Vol. 2, §2906.2, at 1460. The latter position can be found in Dickson and Wilson, *Ontario Estate Practice* (2nd ed., 1986), at 111.

Administration Act.[66] Its position is that the approval of the Official Guardian is required in all sales for the purpose of distribution where a minor or a mentally incompetent person has an interest in the property, even where adults approving the sale constitute a majority of the persons beneficially entitled to not less than one-half of all the interests in the real property.[67]

The scope of these provisions has been reduced in practice by the policy adopted by the Official Guardian and, possibly, by a restrictive position taken by the court to its role under section 17(2). It seems that the Official Guardian has taken a limited view of his role under section 17(2). As far as approval on behalf of minors is concerned, the Official Guardian requires the consent of minors over sixteen years of age who are interested in the estate, and will not concur where they refuse to consent or where they cannot be located; in such cases, a court application is required.[68] Section 17(2) also confers on the Official Guardian power to approve a sale on behalf of beneficiaries who cannot be located, mentally incompetent beneficiaries not so found,[69] and beneficiaries whose concurrence it would, in the opinion of the Official Guardian, be inconvenient to require.

A narrow view has been taken of the court's power to dispense with the concurrence of persons beneficially entitled:[70]

> It appears to me that the Court should refrain from acting so as to compel a sale against the wish of any beneficiary at a price which the beneficiary deems inadequate, except in extreme cases where the objection of the beneficiary is plainly shewn to be purely capricious or obstructive.

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[66] Ontario, Office of the Official Guardian, *Practice and Procedure with respect of Sales of Land Pursuant to Sections 15, 17, and 21 of the Estates Administration Act, R.S.O. 1980, c. 143* (1991) (hereinafter referred to as "Official Guardian Policy"), at 2.

[67] *Ibid.*, at 2. This position is based on s. 15 of the Act, which provides as follows:

> 15.—(1) Where a minor is interested in real property that but for this Act would not devolve on the personal representative, no sale or conveyance is valid under this Act without the written approval of the Official Guardian, or, in the absence of such consent or approval, without an order of a judge.

[68] Official Guardian Policy, *supra*, note 66, at 3. Where only minors are beneficially entitled to the real property, it is generally considered that the appropriate procedure for the sale of the property is an application under the *Children's Law Reform Act*, R.S.O. 1980, c. 68, s. 60, as en. by S.O. 1982, c. 20, s. 1.

[69] Section 17(4) of the *Estates Administration Act*, *supra*, note 3, provides that "[w]here a person beneficially entitled is a patient in a psychiatric facility under the *Mental Health Act* and the Public Trustee is committee of his estate, the concurrence and approval required by subsections (2) and (3) may be given by the Public Trustee on behalf of such patient". Subsection (4) deals with the division of real property among beneficiaries: see discussion, *infra*, this ch., sec. 3(d).

[70] *Re Logan* (1927), 61 O.L.R. 323, at 326, [1927] 4 D.L.R. 1074 (App. Div.) (*per* Middleton J.A.). It should be noted that the concurrence of all beneficiaries was required until 1931 when the Act was amended to provide that there need only be concurrence of a majority of beneficiaries, including the Official Guardian on behalf of infants: *The Devolution of Estates Act, 1931*, S.O. 1931, c. 32, s. 3.

The complex provisions dealing with sale for the purpose of distribution are designed to provide protection to beneficiaries. Section 19 also amply protects good faith purchasers. Creditors of the deceased's estate, however, lose their ability to have recourse against the real property sold; section 19 makes it clear that a good faith purchaser for value "is entitled to hold [the property] freed and discharged from any debts or liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by his will . . . and is not bound to see the application of the purchase money".

(c) Power of Sale of Real Property Under the Will

The provisions of the *Estates Administration Act* are merely facilitative: they confer powers of sale where no such powers are given by the deceased's will; they do not in any way control or restrict powers that are given by the will.[71] Consequently, where personal representatives are expressly given a general power of sale under a will, the land will not automatically vest in beneficiaries at the end of three years. Nor is there any need for personal representatives to obtain the consent of beneficiaries or, where there are minor or mentally incompetent beneficiaries, the consent of the Official Guardian, in order to effect a sale for the purpose of distribution of the proceeds.

Even where the will does not confer an express power of sale, a power of sale may be implied in certain circumstances, and the same consequences follow as in the case of an express power of sale. At common law, it was established that a direction—as distinct from a mere authority—to executors by the will to pay debts created a charge on the assets, including real property, and that it gave them an implied power of sale. This principle was further expanded by statute. The current version, section 44 of the *Trustee Act*,[72] provides as follows:

> 44.—(1) Where by any will coming into operation after the 18th day of September, 1865, a testator charges his land, or any specific part thereof, with the payment of his debts or with the payment of any legacy or other specific sum of money, and devises the land so charged to his executors or to a trustee without any express provision for the raising of such debt, legacy or sum of money out of such land, the devisee may raise such debt, legacy or money by a sale of such land or any part thereof, or by a mortgage of the same.
>
> (2) Purchasers or mortgagees are not bound to inquire whether the powers conferred by this section, or any of them, have been duly and correctly exercised by the person acting in virtue thereof.

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[71] Two provisions of the Act deal with this explicitly. Section 10 provides that "[n]othing in section 9 derogates from any right possessed by an executor or administrator with the will annexed under a will or under the *Trustee Act* or from any right possessed by a trustee under a will". Section 17(7) provides that "[s]ection 16 and this section . . . do not derogate from any right possessed by a personal representative independent of this Act".

[72] *Supra*, note 61.

The courts have interpreted this provision expansively. First, the provision has been held to apply where the testator does not expressly charge the land with the payment of debts or legacies; a direction to pay debts, in accordance with the common law principle, has been taken to create a charge.[73] Similarly, a direction to pay legacies seems also to attract the operation of section 44.[74]

The second point is that, although section 44(1) makes specific reference to the land being devised to "his executors . . . without any express provision for the raising of such debt, legacy or sum of money out of such land", it was held in *Re Jefferies and Calder*[75] that section 44(1) applies even in the absence of such a devise. The background to this is that prior to 1926 the equivalent provisions to section 44 contained a subsection that explicitly stated that the power of sale conferred by the section was not dependent on the testator having devised the land to the executor. This subsection was omitted in *The Trustee Act, 1926*.[76] The position taken in *Re Jefferies and Calder*, however, can be justified by the fact that section 2(1) of the *Estates Administration Act* vests the testator's property in her personal representatives, making redundant any express devise to them.[77]

(d) Distribution to Beneficiaries in Kind

Section 17 of the *Estates Administration Act* provides in elaborate detail for the distribution of real property of an estate among the persons beneficially entitled. The scheme is restrictive.

Section 17(3) authorizes personal representatives "to convey, divide, or distribute" the real property among persons beneficially entitled according to their respective shares and interests. Its effect is restrictive in three main ways. First, the provision requires the concurrence of all adult persons so entitled. Second, the subsection calls for "the written approval of the Official Guardian on behalf of minors or mentally incompetent persons".[78] In addition, section 17(6) confers a power on the Official Guardian to approve

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[73] *Re Reynolds and Harrison* (1921), 51 O.L.R. 123, 66 D.L.R. 398 (H.C. Div.).

[74] Lamont, *supra*, note 56, at 273. Compare *Re Nattress and Levy*, [1946] O.W.N. 690, [1946] 4 D.L.R. 156 (H.C.J.) (subsequent reference is to O.W.N.), where emphasis was placed on the will of the testator directing the executors to pay legacies. However, emphasis was also placed on the fact that "the residuary clause contained in the will is worded in such a manner as to blend the real and personal estate in one mass" (*ibid.*, at 691). Moreover, no reference is made in the reasons for judgment to the predecessor of s. 44 of the *Trustee Act* that was applicable at the time.

[75] [1951] O.W.N. 27 (H.C.J.).

[76] S.O. 1926, c. 40.

[77] Lamont, *supra*, note 56, at 273.

[78] Section 17(4) provides that "[w]here a person beneficially entitled is a patient in a psychiatric facility under the *Mental Health Act* and the Public Trustee is committee of his estate, the concurrence and approval required by subsections (2) and (3) may be given by the Public Trustee on behalf of such patient".

on behalf of beneficiaries who cannot be located and beneficiaries whose concurrence it would be inconvenient to require. This power is equivalent to that conferred on the Official Guardian by section 17(2) in the case of a sale for the purpose of distribution.[79]

The third limitation on the effect of section 17(3) is that, in the absence of an order of a judge, real property distributed to beneficiaries continues to be liable for the debts of the deceased owner.[80] If a beneficiary to whom real property is distributed sells it to a good faith purchaser for value, the property continues to be subject to the debts of the deceased. The purchaser will be free of any such claims only after the expiration of the period of three years from the death of the deceased, but even then it will continue to be subject to the debts if "some action or legal proceeding has been instituted by the creditor, his assignee or successor to enforce the claim and a *lis pendens* or a caution has, before . . . [the end of such period], been registered against the property".[81] The purchaser is then given a right to relief over against the person beneficially entitled and against the personal representative but, in the case of the latter, only if she conveyed it with knowledge of the debts or without duly advertising for creditors.[82]

Section 17(5) explicitly confers on the court jurisdiction to order the distribution of real property to or among beneficiaries:[83]

> 17.—(5) Upon the application of the personal representative or of any person beneficially entitled, the court may, before the expiration of three years from the death of the deceased, direct the personal representative to divide or distribute the estate or any part thereof to or among the persons beneficially entitled according to their respective rights and interests therein.

If the property is vested in a beneficiary pursuant to such a court order, a purchaser in good faith and for value from the beneficiary would take the property free of the debts of the deceased "except such as are specifically

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[79] Formerly, the Official Guardian did not consent to such conveyances on behalf of any of the classes of persons on whose behalf he was empowered to concur. This made it necessary to obtain a court order in the circumstances where the Official Guardian was empowered to approve the division of the estate: see Howland, *supra*, note 61, at 68, and Lamont, *supra*, note 56, at 279.

[80] *Estates Administration Act*, *supra*, note 3, s. 17(8)(a).

[81] *Ibid.*, s. 17(8)(a).

[82] *Ibid.*, s. 17(8)(b). Where the property is retained by the beneficiary at the end of the 3 year period, and where no *lis pendens* or caution has been registered, the beneficiary holds the property on the same basis that he would have held if it vested in him under the automatic vesting provision: *ibid.*, s. 17(8)(c). See discussion, *supra*, this ch. sec. 3(a).

[83] It is unclear whether the court's power extends beyond the 3 year period in a case where the real property remains vested in the personal representatives because of the registration of a caution or cautions under s. 9.

charged thereon otherwise than by his will".[84] But the Act preserves any rights of the creditors against the personal representative personally or against the beneficiary to whom the land was conveyed.[85]

Apparently the established practice[86] is that the court will grant an order under section 17(5) only upon proof that there has been advertisement for creditors, and either that their claims have been satisfied or that there are sufficient assets to pay them in full.[87]

The provisions in the *Estates Administration Act*, it should be re-emphasized, are facilitative. Like the provisions dealing with powers of sale, they provide for distribution in kind where such a power is not given by the will. They do not in any way control or restrict powers that are given by the will.[88]

4. RECOMMENDATIONS

(a) Vesting in the Estate Trustee: Assimilation of Personal and Real Property

(i) General Considerations

We have already expressed our general conviction that distinctions between the treatment accorded to real property and that given to personal property are now generally unjustified.[89] This view is of particular importance in the present context. From this view flows our basic recommendation that

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[84] *Estates Administration Act*, *supra*, note 3, s. 20(1).

[85] *Ibid.*

[86] Lamont, *supra*, note 56, at 280.

[87] Section 126 of the *Land Titles Act*, *supra*, note 53, provides a procedure for land registered under that Act to be registered as clear of debts of the deceased:

> 126. Where land has been transferred to a person beneficially entitled thereto within three years after the death of the registered owner or has become vested in the person beneficially entitled thereto under the *Estates Administration Act*, the land registrar, upon application and the production of satisfactory evidence showing that all debts of the deceased registered owner have been paid and that creditors have been notified, may,
>
> (a) where the person beneficially entitled is shown on the register as owner of the land and the register shows that the land is subject to the unpaid debts of the deceased registered owner, delete the reference to the unpaid debts from the register; or
>
> (b) register the person beneficially entitled to the land without reference to the unpaid debts of the deceased registered owner.

[88] *Estates Administration Act*, *supra*, note 3, s. 17(7).

[89] *Supra*, ch. 1.

no distinction should be drawn between real property and personal property with respect to the vesting and the disposition of the property. The second matter that is fundamental to our recommendations is the view that we have taken that all property of the deceased should vest in the estate trustee, and that title should in all cases be derived from a transfer from the estate trustee.

It is remarkable that these principles were introduced into the law of Ontario in 1886 by *The Devolution of Estates Act, 1886*.[90] The essential purposes of that reforming statute, however, were so qualified by judicial interpretation and, more importantly, substantial statutory amendment, that there are now substantial differences in the treatment of real and personal property. By contrast to personal property, the system of vesting and transfer of real property is uncertain, complex, and inconvenient in practice.

(ii) Automatic Vesting of Real Property in Persons Beneficially Entitled

There are two main arguments in support of the present system of automatic vesting and its attendant caution mechanism. First, it is argued that the system is economical: why waste money in vesting property in the personal representative, who would then have to transfer it to the beneficiary, if the property could be vested directly in that same beneficiary? A second argument is that, in some cases, practices may have grown up in reliance on this system. Quite often, especially in rural areas, nothing is done about the title to real property as it passes from generation to generation, either by testate or intestate succession. When the property is finally sold out of the family, a chain of title can be made by the combined operation of section 48 of the *Registry Act*,[91] which permits the registration of the will itself, and the automatic vesting provisions of the *Estates Administration Act*. Otherwise, conveyances from the appropriate personal representatives would have to be made and registered and, in many cases, probate or letters of administration would have to be obtained, all of which, so the argument goes, would unnecessarily increase costs.[92]

We do not find these arguments persuasive. First, the proof of title that has devolved by virtue of the automatic vesting provisions will often be complicated. The chief reason for this is that title passes through those beneficially entitled. For a number of reasons, this will often give rise to difficulty. First, there may be several persons to whom beneficial interests have been conferred, and title will pass through all of them. Second, there

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[90] *Supra*, note 40.

[91] *Supra*, note 45.

[92] Where an executor is appointed by the will, it would not be necessary to obtain an estate trustee certificate, since the executor derives his authority from the will. Where no executor is appointed or a purchaser doubts the validity of the appointment, an estate trustee certificate would have to be obtained. Otherwise, the chain to title would be broken.

may be difficult questions of law or fact in the determination of beneficial entitlement. For example, the determination of beneficial entitlement under a will may depend on questions of interpretation of the will, or entitlement may depend on the order of deaths of a number of people about whom the facts are obscure. These difficulties obviously will be compounded where a title is required to be traced back in this fashion through several generations. The third source of difficulty is that it will be necessary to determine whether the automatic vesting provisions in fact apply in any particular case. Uncertainty about this could arise because of the fact that section 10 of the *Estates Administration Act* provides, in effect, that a will may preclude the operation of the automatic vesting provisions and because it will sometimes be a difficult matter of interpretation whether a will has had that effect.[93] In addition, it will be necessary to determine whether a caution has been registered, because such a caution will prevent the automatic vesting.

The argument that this system produces low transaction costs in the transmission of title on death seems, therefore, to be open to doubt since difficult questions of fact and law will frequently arise in the proof of title by virtue of this system. Moreover, the very complexity of the *Estates Administration Act*, and its infrequent use, means that lawyers must expend considerable time in understanding its provisions. This, of course, tends to increase costs.

The system is infrequently used for two main reasons. First, it is inconsistent with the fundamental principles of the Land Titles system and, consequently, land registered under that Act does not automatically vest in those beneficially entitled; rather, transmissions from the name of the deceased, to the name of the personal representative, and to the name of the beneficiary, are required to be registered.[94] Second, most professionally drawn wills include provisions that have the effect of vesting all the property of the deceased in the personal representatives and of giving them wide powers of disposition. Such clauses completely exclude automatic vesting under the *Estates Administration Act*. Use of these provisions in wills demonstrates the aversion of professional advisers to the effect of the statutory provisions. The net result is that Act operates, therefore, mainly in cases of intestacy and as a trap for the unwary draftsman of a will.

Comparison with the law in other jurisdictions shows the system of automatic vesting and cautions to be peculiar to Ontario law. One other province, New Brunswick, does have an automatic vesting provision.[95] Indeed, it was amended in 1977 to enlarge its scope, by extending its application to "[m]oney and securities for money to a value of [$2,500], [and]

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[93] See, for example, *Re Jefferies and Calder*, *supra*, note 75, and *Re Brankston and Wright* (1985), 50 O.R. (2d) 666, 37 R.P.R. 165 (H.C.J.).

[94] *Supra*, this ch., sec. 3(a).

[95] *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, s. 19 (2 years after the death of the deceased).

personal chattels".[96] The New Brunswick legislation, however, does not provide for cautions. Other provinces provide for all the property of the deceased to vest in the personal representative, and they require some positive act by the personal representative (or, in some cases, the court) to transmit the title to the beneficiaries. They deal with the problem of the failure of the personal representative to convey within a reasonable time by providing that, after a specified time, the beneficiary may apply to the personal representative for a distribution of the estate. If the personal representative fails to do so, an application may be made to the court. The court may then order the personal representative to convey or, in default, may order the vesting of the realty in the beneficiary.[97]

We think that it is clear that the retention of the system of automatic vesting, and the ancillary system of registration of cautions, is unjustified. Accordingly, we recommend that it should be abolished. We recommend that this system should be replaced with a system under which the chain of title from the deceased is traced solely by means of the estate trustee certificate, except where it is necessary to effect vesting by court order.[98] We also recommend repealing the section 48 of the *Registry Act*, which deals with the registration of wills as a link in the chain of title. The only permissible link should be the estate trustee certificate. This will forestall any problems as to the authenticity of wills and will assure a purchaser that the purported will can, in fact, be treated as the deceased's valid will. This will strengthen the position of purchasers, who will not need to have recourse to the *Registry Act*, but will be able to rely on the chain of title established from the deceased to the personal representative.

We are, however, concerned that persons should not be prejudiced by reliance on the existing system. We therefore recommend that legislation should not affect the vesting of property that occurred before its coming into force. We recommend, in addition, that persons whose interests in property vested before that date should continue to be able to use the existing provisions of the *Registry Act* to register wills affecting their title with the same effect as under the present law.

(iii) The Time of Vesting in the Personal Representative

It will be recalled from our summary of the present law[99] that, where an executor is appointed and willing and able to act, the property of the deceased vests in the executor at the time of death. In other cases, immediate vesting cannot occur in the person who is eventually appointed as

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[96] S.N.B. 1977, c. 18, s. 2.

[97] Anger and Honsberger, *supra*, note 4, Vol. 2, §2906, at 1458.

[98] *Trustee Act*, *supra*, note 61, ss. 10-13.

[99] *Supra*, this ch., secs. 2(a)(i) and 3(a).

administrator. To some extent, this hiatus is dealt with by the doctrine of relation back. We recommend that the current law respecting the immediate vesting in the estate trustee named in the will, as well as the rule giving retrospective effect to a vesting in an estate trustee subsequently appointed, be retained.

Title to the estate property cannot actually be located in the administrator unless and until the person is in fact appointed. This apparent gap in the title to property of the deceased raises puzzling theoretical questions. More importantly, it gives rise to potential practical problems, the chief of which is that there are a number of circumstances in which notice might need to be served with respect to property of the deceased prior to the grant of an estate trustee certificate.[100] It is arguable that this apparent gap is filled under the present law in Ontario by the property vesting in a judge of the Ontario Court (General Division).[101] However, this is not clearly established, and some jurisdictions have dealt with the problem by legislation. For example, in British Columbia the personal estate of the deceased vests in the court until administration is granted.[102] In England the real and personal property of the deceased vests in the President of the Family Division of the High Court;[103] in New South Wales it vests in the Public Trustee;[104] and in New Zealand it vests in the Crown.[105] It has been held in England that the legislative provision does not impose any active obligations on the President of the Family Division.[106]

We recommend that similar legislation should be enacted in Ontario. Any gap in the vesting of the property of the deceased should be filled by the interim vesting of the property in an appropriate public official. There should be someone to serve with any document, particularly where the appointment of an estate trustee is not possible in the time available. The public official best suited for this position is the Estate Registrar for Ontario.

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[100] See, for example, *Fred Long & Sons Ltd. v. Burgess*, [1950] 1 K.B. 115, [1949] 22 All E.R. 484 (C.A.).

[101] See *supra*, this ch., secs. 2(a)(i) and 3(a).

[102] *Estate Administration Act*, *supra*, note 6, s. 3.

[103] *Administration of Estates Act 1925*, 15 & 16 Geo. 5, c. 23 (U.K.), s. 9. Section 9 states that the property is vested in the "Probate Judge", which is defined to mean the President of the Family Division of the High Court: see *Administration of Estates Act* 1925, *ibid.*, s. 55(1) (xv), as en. by *Administration of Justice Act 1970*, 1970, c. 31 (U.K.), s. 1(6), Sch. 2, para. 5.

[104] *Wills, Probate and Administration Act*, S.N.S.W. 1898, s. 61. This explicitly provides for such interim vesting on testate, as well as intestate, succession.

[105] *Administration Act 1969*, S.N.Z. 1969, No. 52, s. 22.

[106] *Re Deans*, [1954] 1 W.L.R. 332, [1954] 1 All E.R. 496 (Ch.).

(iv) Vesting in Co-Estate Trustees

In chapter 2, we considered the authority of estate trustees where there are two or more of them.[107] In that chapter, we recommended that, like other trustees, estate trustees should have joint authority: one of several of them, acting alone, should not be able to bind the estate.

A related question concerns the vesting of property in several trustees. We see no reason to distinguish in this context between estate trustees and other trustees. It is clear that property vests in ordinary trustees as joint tenants[108] and, even under the present law, it seems that the same principle does in fact apply to personal representatives.[109] Moreover, this principle seems to be assumed by section 46(1) of the *Trustee Act*.[110] Nevertheless, we recommend that the vesting of property in estate trustees as joint tenants should be made explicit by statutory provision.[111]

(b) The Power of Sale of the Estate Trustee

In the case of real property, the *Estates Administration Act* distinguishes sharply between an exercise of a power of sale for the purpose of paying debts of the estate and an exercise of a power of sale for the purpose of distribution of the proceeds among the beneficiaries. The exercise of the power in the latter case is restricted by elaborate provisions designed to mediate among the competing interests of purchasers, creditors of the estate, and beneficiaries.[112] By contrast, in the case of personal property, personal representatives have an unfettered power of sale, which allows them to give good title to a purchaser without regard to the interests of beneficiaries and creditors.[113]

We take the position that this distinction is unjustified and that estate trustees should have a general power to sell property of the estate, subject

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[107] *Supra*, ch. 2, sec. 3(h).

[108] Waters, *Law of Trusts in Canada* (2d ed., 1984), at 675. See, also, *Trustee Act*, *supra*, note 61, s. 9.

[109] Williams, Mortimer and Sunnucks, *supra*, note 5, at 466.

[110] Section 46(1) provides that "[w]here there are several personal representatives and one or more of them dies, the powers conferred upon them shall vest in the survivor or survivors, unless there is some provision to the contrary in the will". Section 25 of the *Trustee Act* makes the same provision for trustees.

[111] Compare the New Zealand *Administration Act*, *supra*, note 105, s. 24(3), which provides for vesting in administrators as joint tenants.

[112] See *supra*, this ch., sec. 3(b)(ii).

[113] Of course, their power to give a good title to purchasers does not mean that personal representatives will be immune from personal liability for a wrongful exercise of this power. See note 12, *supra*.

only to minor qualifications, which we shall explain shortly. In support of this view, we wish to make three points. First, a general power of sale will facilitate transactions by estate trustees: purchasers will not be discouraged by complications caused by the present elaborate provisions; the cost of transactions will be reduced and efficient estate administration encouraged; and recalcitrant beneficiaries will be unable to block proper exercises of the power of sale by estate trustees.

The second point is that one of our general concerns in this report has been that the powers and duties of an estate trustee should not differ from those of an ordinary trustee, except where there is a good reason. In the *Report on the Law of Trusts*, the Commission made the following recommendation:[114]

> 5. The revised [*Trustee Act*] should contain a set of administrative powers that are customary in well-drawn contemporary trust instruments. Further, the testator or settlor should be able to exclude or modify any of the statutory administrative powers conferred upon trustees.

The Commission also noted that the present *Trustee Act* does not give trustees a power of sale,[115] and recommended that "[t]he revised Act should provide that trustees may sell trust property by public auction or private contract for cash or credit on appropriate security".[116] The facilitative approach that was followed in the *Report on the Law of Trusts* supports the adoption of a general power of sale for estate trustees, since the inclusion of such a power is in fact "customary in well-drawn contemporary" wills.

The third point is concerned with the protections that will be removed by granting such a general statutory power of sale. The creditors of an estate have an interest in ensuring that their debts are paid, and their position is weakened when property of the estate is sold or distributed, leaving them with only personal claims against the personal representatives. Beneficiaries have an interest in ensuring that unduly depreciatory sales are not made, that sales are not unnecessarily carried out against their wishes, and that the personal representatives account for the proceeds of sale. We think, however, that any system that fully meets these concerns will be so cumbersome as to impede seriously the convenient administration of estates. Moreover, for reasons that we shall mention below, the Ontario system in practice has been one in which personal representatives most often have a general power of sale, and it does not appear that there has been any systematic prejudice to the interests of either beneficiaries or creditors.

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[114] Ontario Law Reform Commission, *Report on the Law of Trusts* (1984) (hereinafter referred to as "Trusts Report"), Vol. 1, at 305. For a discussion, see *ibid.*, at 233-34.

[115] *Ibid.*, at 238.

[116] *Ibid.*, at 306. For a discussion, see *ibid.*, at 238-40.

For a number of reasons, the protection afforded by the present elaborate provisions in the *Estates Administration Act* is generally illusory. We have already discussed the prime reason previously in the context of the system of automatic vesting and cautions: it is "customary in well-drawn contemporary" wills to include a general power of sale. This means that professionally-advised testators do not generally allow beneficiaries and creditors of their estates the protections afforded by the *Estates Administration Act*. Putting it another way, those protections are in fact afforded haphazardly, applying most often in cases of intestacy and home-made wills. The inclination of professionally-advised testators to give executors a power of sale has been supported by the legislature in the enactment of section 44 of the *Trustee Act*,[117] which, in some circumstances, gives a power of sale to executors to whom such an explicit power has not been given by the will. In this context, the judiciary have also carried out a policy of encouraging the exercise of powers of sale by executors, since they have held that section 44 applies even where the land is not explicitly devised by the will to the executors.[118]

Even where a power of sale is not given by the will or by virtue of section 44 of the *Trustee Act*, the restrictive provisions of the *Estates Administration Act* often will have no effect on a sale by the personal representative. The reason is that these provisions do not apply to a sale for the purpose of paying debts, and this is so whether the sale is wholly or even partly for the purpose of paying debts: the restrictive provisions apply only where a sale is made solely for the purpose of distribution.[119]

A related point should also be emphasized. For a good faith purchaser for value, the consequences of a sale for the purpose of paying debts are as follows: purchasers take the land freed and discharged from any debts and liabilities of the deceased, except such as are specifically charged thereon otherwise than by the will; they take free from all claims of the persons beneficially entitled; and they are not bound to see to the application of the purchase money.[120] Good faith purchasers for value are protected so long as the instrument of conveyance purports to be for the payment of debts, as long as they do not have notice to the contrary. They need not make inquiries whether it is in fact being made for this purpose.[121] Consequently, these provisions are not effective protection for the beneficiaries or the creditors against an unscrupulous personal representative who is embarking on a course of intentional wrongdoing.

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[117] *Supra*, note 61. See *supra*, this ch., sec. 3(c).

[118] *Ibid.*

[119] *Ibid.*, sec. 3(b)(i).

[120] *Estates Administration Act*, *supra*, note 3, s. 19.

[121] *Supra*, this ch., sec. 3(b)(i).

The restrictions created by the *Estates Administration Act* are also limited in their application because of the fact that they apply only to sales of real property. As we have explained, personal representatives have a general power of sale over personalty.[122] This distinction is inconsistent with our general view that the same treatment should be accorded to both real property and personal property. Moreover, there would be no justification for extending to personalty the existing complex provisions applicable to realty. Personalty in an estate often will be very valuable. Nevertheless, it does not seem that persons interested in estates, whether as beneficiaries or creditors, have suffered because personal representatives have a generally unrestricted power to sell personal property.

Consideration of the systems in operation in other jurisdictions has not weakened our view that the elaborate provisions in the present legislation restricting the power of sale over real property should be replaced with a generally unrestricted statutory power of sale. Like Ontario, other Canadian jurisdictions generally restrict the statutory power of sale over real property.[123] Nova Scotia,[124] moreover, has a statutory scheme that is even more restrictive than the Ontario system, in that court intervention is more extensive. Similarly, most American jurisdictions have traditionally required court supervision of sales by personal representatives, including those for payment of debts. This reflects the general approach to estate administration taken in American jurisdictions, which have adopted a system of court-supervised administration. However, such supervision of estates has been subjected to trenchant criticism in the United States.[125] In large measure, the current American Uniform Probate Code[126] has been influenced by this criticism; in broad terms, it represents a movement towards a system under which court intervention is reduced and personal representatives are given extended power. This is clearly exemplified by section 3-711, which grants personal representatives a broad power of sale:

> Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

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[122] *Ibid.*, sec. 2(a)(ii).

[123] See, for example, *The Devolution of Real Property Act*, R.S.S. 1978, c. D-27, ss. 11-12; *Devolution of Real Property Act*, R.S.A. 1980, c. D-34, ss. 9-12; *Probate Act*, R.S.P.E.I. 1974, c. P-21, ss. 109, 110, and 113; and *Devolution of Estates Act*, *supra*, note 95, ss. 9-12, as am. by S.N.B. 1986, c. 4, s. 12(2) and (3).

[124] *Probate Act*, R.S.N.S. 1989, c. 359, ss. 50-64.

[125] See, for example, Langbein, "The Nonprobate Revolution and the Future of the Law of Succession" (1984), 97 Harv. L. Rev. 1108, at 1116, *nn.* 36 and 37.

[126] National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code*.

The English *Administration of Estates Act 1925* gives personal representatives a general power of sale over both real and personal property, providing as follows:

> 33.—(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—
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> (a) as to the real estate upon trust to sell the same; and
>
> (b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money,
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> with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets, personal chattels be not sold except for special reason.
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> (2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased.

Accordingly, we recommend that, subject to the power of the testator to provide otherwise, estate trustees should have a general statutory power to sell both the real and personal property of the estate, whether for the purpose of payment of debts or for the purpose of distribution. This power should be exercisable without notice to any person, including the Official Guardian and the Public Trustee;[127] moreover, it should be exercisable without any order of the court.

Conferral of this power, we must emphasize, would not affect the question of the personal liability of estate trustees to beneficiaries and creditors, a matter that would continue to be governed by the principles applied by the courts. Thus, an estate trustee who, in the exercise of this power, sells property that has been specifically bequeathed or devised may be found liable to a beneficiary if the sale was not necessary to the administration of the estate. Similarly, an estate trustee of an insolvent estate who sells property at a gross undervalue risks liability to a creditor.

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[127] Under the present *Estates Administration Act*, *supra*, note 3, in certain circumstances the concurrence and approval of the Public Trustee is required in place of that of the Official Guardian. See note 69, *supra*.

As indicated above, we are of the view that the testator should be free to limit the wide power of sale by providing restrictions in the will, and we so recommend. It is important, however, that the potential reduction of an estate trustee's power should not seriously undermine the policy of facilitating transactions with estate trustees: a purchaser should not be required to undertake any extensive inquiries or to make any difficult determination about the power of sale possessed by the estate trustee. A purchaser should not be required to peruse and interpret the will to ascertain whether the sale is authorized and conducted in accordance with the will. A reasonable compromise between the policy of allowing freedom to the testator and the policy of facilitating transactions with the estate trustee is that restrictions should bind a purchaser only if they come to her attention in two ways. Otherwise, the purchaser should receive an unimpeachable title.

First, a purchaser should be bound by any restrictions provided by the will if, and to the extent that, the restrictions are noted on the estate trustee certificate.[128]

Second, a purchaser who, at the time of her purchase from the estate trustee, has actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will, takes the property subject to the terms of the will.

Accordingly, we recommend that a person purchasing property from an estate trustee in good faith and for value should be entitled to hold it freed and discharged from any debts or liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by her will, and from all claims of persons beneficially entitled thereto, and takes the property subject to the terms of the will only where the restrictions on the power of sale are noted on the estate trustee certificate or where she has actual notice at the time of the purchase that the estate trustee does not possess the power she purports to exercise, or that she is exercising the power in a manner that is contrary to that provided in the will.

We have been generally concerned to facilitate the dealings of purchasers with estate trustees. We have attempted to do this by conferring wide general powers of sale on the estate trustee, and by severely limiting the extent to which the purchaser is required to make inquiries about the propriety of the transaction. The effect of the recommendations we have already discussed is that a purchaser from an estate trustee will only need to make the usual inquiries about title and, in addition, to satisfy himself

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[128] The application for an estate trustee certificate should require that applicants, or their solicitors, copy any restrictions on the power of sale of the estate trustee. If the clauses dealing with the power of sale are too lengthy for a standard application form, the clauses should be appended to the application. The estate trustee certificate would replicate the clauses appearing in the application.

that the purported estate trustee has duly received the estate trustee certificate and that it does not prohibit the sale. If this procedure is followed, the purchaser will receive a title that is unimpeachable at the suit of beneficiaries or creditors. We recommend also that the purchaser should not be bound to see to the application of the proceeds of the sale.

Before turning to our proposals respecting distribution in kind, there are two related matters we wish to address.

In the *Report on the Law of Trusts*,[129] we expressed the view that, in general, a purchaser from a trustee should be entitled to assume, on the basis of the appropriate instruments of appointment, discharge or vesting, that persons purporting to act as trustees are validly appointed, that the trust property is vested in them, that they possess the powers they purport to have, and that they are properly exercising those powers. We also took the view that this protection for purchasers should apply where a new trustee is appointed, either as a substitute for a previous trustee or as an additional trustee. Protection of this kind should also apply to estate trustees. We therefore recommend that purchasers from an estate trustee who rely upon the production of an estate trustee certificate or a deed of discharge that contains a vesting declaration, express or implied, whether or not they otherwise have notice of the will, should be able to assume without inquiry that the former estate trustees and the substitute or additional estate trustees possessed or possess and properly exercised or are properly exercising every power that they purported or purport to exercise over the property.[130]

In the *Report on the Law of Trusts*, we recommended that protection should not be extended to purchasers who have actual notice that the trustees do not possess the power they purport to exercise, or that they are exercising a power improperly.[131] However, we were of the view that a purchaser who has actual notice should be protected in a case where title to the property has been vested in a purchaser who did not have actual notice of this defect. Such a purchaser, we recommended, should not take the trust property "subject to the terms of the trust".[132] We are of the view that the same policy should apply to purchasers from estate trustees. We therefore recommend that a purchaser who, at the time of the purchase from the estate trustee, has actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will, should take the property subject to the terms of the will, unless title to the property has been held by a prior purchaser without actual notice that the estate trustee does

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[129] Trusts Report, *supra*, note 114, at 183. See, also, *ibid.*, at 163-72.

[130] Draft Trustee Bill, s. 30(1).

[131] Trusts Report, *supra*, note 114, at 183.

[132] *Ibid.*

not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will.

(c) The Manner of Distribution

(i) Simple Distribution in Kind

In our discussion of the present law, we explained how, in the case of personal property, the law dealing with distribution in kind is unclear,[133] and, in the case of real property, distribution in kind is generally not possible under the provisions of the *Estates Administration Act*.[134] In framing an appropriate general rule, we have taken account of factors similar to those relevant to the estate trustee's power of sale: the same rule should apply to real and personal property; the rule should be consistent with the result produced by typical well-drafted wills; and, of course, so far as reasonably possible, the rule should be simple and clear so that it can be applied easily and inexpensively. The general rule that we recommend is that, after payment of debts and taxes, administrative and funeral expenses, and legacies, the estate trustees should be required to convert the residue of the estate and pay the shares of the beneficiaries in cash. This rule should apply to both testate and intestate succession. The proposed rule would accord with a widely held view of the existing law applicable to personalty,[135] and with the almost invariable practice in professionally-drafted wills. This rule would provide for what in most cases is the simplest and most convenient way to administer an estate. We wish to emphasize, however, that this rule will in three respects be merely a *prima facie* rule. First, it should be subject to a contrary provision in the will, which will allow a testator to provide for distribution in kind in whatever way is considered appropriate. Second, we recommend that, in the absence of contrary provision in the will, estate trustees should have a power of appropriation. Finally, where the estate is solvent, and all the beneficiaries have legal capacity and agree that a distribution in kind should be made, the estate trustees should be required to make such distribution.

(ii) Appropriation and Distribution in Kind of Particular Assets to Particular Beneficiaries

While the position in England seems to be clear, there is virtually no jurisprudence in Canada on the appropriation and distribution of personal property.[136] The law is therefore unclear in Ontario. In the case of real

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[133] *Supra*, this ch., sec. 2(b).

[134] *Ibid.*, sec. 3(d).

[135] But this view of the present law is probably restricted to the case of intestacy, as well as testate succession where there is an express trust for sale: see Cullity and Brown, *supra*, note 14, at 326-27. But for a less restrictive view, see Brulé, *supra*, note 14.

[136] *Supra*, this ch., sec. 2(b)(ii).

property, the law and practice on appropriation and distribution in kind, under section 17 of the *Estates Administration Act*, is highly restrictive.[137] At least in relation to real property, the law and practice has been partly influenced by a desire to protect creditors of the estate. The protection given, however, may impede the convenient administration of an estate and its application is uneven or, in many cases, illusory.

The relevant points are similar to those we made previously in relation to the limitations placed by the *Estates Administration Act* on the power of sale for the purpose of distribution.[138] First, the protection is uneven, in that it is applies only to real property; we need not belabour our view that there is today no justification for a system that produces markedly different results, depending upon whether the property in question happens to be personalty or realty. Second, in many cases, the protection is illusory since it can be removed by the insertion of an appropriate provision in a will. In any event, we do not think that protection of creditors is a sufficient reason for obstructing the distribution in kind of property to beneficiaries of an estate. Many wills, in fact, give personal representatives extensive powers to make appropriation and distribution in kind,[139] and it does not appear that this has led to systematic prejudice to creditors. The fact that there are remedies available against a personal representative personally is a sufficient disincentive against distributions being made in prejudice of creditors.

In devising an appropriate rule, we have again taken account of the factors mentioned in the previous section, and note that extensive powers to appropriate and distribute in kind are commonly included in professionally-drawn wills. We have adopted the principle that, in the absence of any reason to the contrary, the powers and duties of estate trustees should be the same as those of ordinary trustees. In our *Report on the Law of Trusts*, we recommended a power of appropriation in the following terms:[140]

> The revised Act should provide that trustees may appropriate property *in specie* in or towards satisfaction of the share or interest of any beneficiary, with the consent of that beneficiary. For the purpose of the appropriation, following consultation with a qualified person where the trustees are not personally qualified, trustees should place a valuation on the property. However, no specific gift made by the trust instrument should be adversely affected by an appropriation of property *in specie*. In addition, within one month of the valuation or such further time as the court authorizes, the trustees, beneficiaries or any other

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[137] *Infra.*, this ch., sec. 4(d).

[138] *Ibid.*, sec. 4(b).

[139] Such provisions are generally included in published books of precedents. See, for example, Honsberger, Brulé and MacGregor (eds.) *O'Brien's Encyclopedia of Forms* (11th ed., 1970), Vol. 9, ch. 24; Scott-Harston and Johnson, *Tax Planned Will Precedents* (3d ed., 1989), at 11 and 20 (clause 13); Sheard, Hull and Fitzpatrick, *Canadian Forms of Wills* (4th ed., 1982), at 19; and Taube, *Estate and Tax Planning* (1978), at 33-35.

[140] Trusts Report, *supra*, note 114, at 307-08. See discussion, *ibid.*, at 248-49. See, also Draft Trustee Bill, s. 35(q).

interested person should be able to apply to the court for a review of the appropriation or the valuation, and, following such notice as the court may order, the court should confirm or make such variation as it considers proper.

We recommend that this power should apply to an estate trustee.

The power that we recommended in the *Report on the Law of Trusts* was simply a power of appropriation, as distinct from the power to appropriate and distribute, to which we have made reference in the course of this discussion. In the trusts context, a power of appropriation alone was sufficient, for the trustee would continue to hold the assets in trust for the beneficiary or beneficiaries. As we noted earlier, in the context of estates administration, appropriation is almost invariably followed by a distribution that is so immediate that the two stages of appropriation and distribution are imperceptible. It is necessary, therefore, to deal specifically with distribution.

First, we believe that is necessary to confer the power to make a distribution. We therefore recommend that, where a beneficiary of an estate is entitled to any specific real or personal property, whether because of the exercise of the power of appropriation recommended above or otherwise, the estate trustee should be able to transfer in kind to such person the property to which she is entitled.

Where distributions in kind are made today in Ontario—whether under the general law or under the provisions of a will—the distribution is customarily made by a transfer in the form appropriate to the property that is the subject of the distribution. It is arguable, however, that title to personal property could pass from the personal representative to the beneficiary by the personal representative making an assent. The doctrine of assents has fallen out of use in Ontario.[141] Nevertheless, we recommend that legislation should make it clear that title can only be transferred from an estate trustee to a beneficiary by the form of transfer appropriate to the property that is the subject of the distribution.

In our view, the remedy of an aggrieved creditor or beneficiary for a wrongful exercise of the power of making appropriation and distribution in kind should ordinarily lie only against the estate trustee, subject to a single qualification, which we shall discuss below. Generally, creditors and beneficiaries should have no right to claim against the beneficiary to whom a distribution was made, against the property distributed, or against a transferee from the beneficiary. It would be undesirable to attach liability to the

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[141] Although a legatee derived his title from the will, transfer of the title to him was not complete until the personal representative had shown that the asset was not required in the administration of the estate, and this was done by an assent. An assent is an act by the executor that indicates, or is presumed to indicate, that he intended the gift in the will to become operative. Such an assent could be expressed or implied, in writing or oral. At common law, the doctrine of assents applied only to gifts by will of personalty. For a discussion, see Oosterhoff, "Practice Note—Assents" (1988-89), 9 E.T. J. 83, and Williams, Mortimer and Sunnucks, *supra*, note 5, at 943-56.

property itself, since it would tend to make the property inalienable in the hands of the beneficiary. Purchasers will be concerned about the risk of a liability of an uncertain amount affecting the property in their hands.

Usually, the beneficiary will not have any reason to know whether either the appropriation or the distribution in kind was properly made and, if she could be fixed with liability, she might be affected by unpredictable liability. This uncertainty would tend to inhibit the beneficiary from utilizing the property to its highest capability, and would be unfair to the beneficiary who has relied on the estate trustee's exercise of these powers.

The person with the best information about the financial position of the estate, and who has control over the appropriation and distribution of an asset, is the estate trustee. Consequently, it is the estate trustee to whom any aggrieved creditor or aggrieved beneficiary should ordinarily look for redress. This is subject to a single qualification: the beneficiary for whom an appropriation or distribution is made should not be protected where she has actual notice at the relevant time that the exercise of the power by the estate trustee was improper.

Accordingly, we recommend that the remedy of an aggrieved creditor or beneficiary for a improper exercise of the power of making appropriations or making distributions in kind should be only against the estate trustee, and that she should have no statutory claim against the beneficiary to whom the distribution was made, against the property distributed or against any transferee from the beneficiary. However, a beneficiary who at the time of the appropriation or distribution in kind had actual notice that the estate trustees were exercising the power improperly should not be entitled to this protection.

(iii) Distribution of Share of Absolutely Entitled Beneficiary

We have mentioned in our summary of the present law that it is apparently established in England that a beneficiary who is absolutely entitled in possession to a share of the residue can generally require that her share be distributed to her, even though other shares remain settled and are not yet distributable.[142] We have called this "the rule in *Re Marshall*".

The rule in *Re Marshall* was considered by the English Law Reform Committee in its report on the powers and duties of trustees.[143] The Committee had received the following suggestion to alter the law:[144]

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[142] *Supra*, this ch., sec. 2(b)(iii).

[143] Law Reform Committee Report, *supra*, note 34.

[144] *Ibid.*, para. 3.64, at 32.

> [L]egislation should confer on trustees of pure personalty held on trust in undivided shares any of which is not yet distributable power to postpone distribution of a share which has become distributable if the distribution (or sale preparatory to a distribution) would diminish the value of the trust property as a whole.

The Law Reform Committee responded by concluding that there should be no change in the law. It saw the issue as follows:[145]

> The difficulty here . . . is one of balancing the competing interests of the beneficiary whose share has become distributable and who is therefore, under the present law, entitled to take his money out and reinvest it elsewhere should he wish, and those of the other beneficiaries, the value of whose interests might be considerably diminished as a result.

The Committee indicated that a settlor or testator could provide for the problem by conferring "upon the trustees power to delay either the vesting of the beneficiaries' interests or the distribution of their shares".[146] In the absence of such a provision, the Committee was satisfied with the present law's preference for the beneficiary seeking distribution.

We agree that ordinarily this will be the preferable way to resolve the dilemma. However, for two main reasons, we recommend legislative treatment of this problem. The first reason is that the applicability of the rule is uncertain in Ontario.[147] The second reason is that the rule is generally considered to apply only to pure personalty and to be inapplicable to land. Given our general principle that differences between real property and personal property should be eliminated, we do not accept that there is justification for this difference in the treatment of pure personalty and land.[148] We are unconvinced by the reasons that have been given for the special treatment of land in this context. In *Re Marshall*,[149] Cozens-Hardy M.R. said:

> [W]here real estate is devised in trust for sale and to divide the proceeds between A, B, C, and D—some of the shares being settled and some of them not—A has no right to say 'Transfer to me my undivided fourth of the real estate, because I would rather have it as real estate than personal estate'. The Court has long ago said that that is not right, because it is a matter of notoriety, of which the Court will take judicial notice, that an undivided share of real estate never fetches quite its proper proportion of the proceeds of sale of the entire estate; therefore, to allow an undivided share to be elected to be taken

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[145] *Ibid.*, para. 3.65, at 32.

[146] *Ibid.*, para. 3.65, at 33.

[147] This is due primarily to *Re Harris*, *supra*, note 21.

[148] It should be pointed out that the distinction suggested is between land, including leaseholds, and pure personalty, rather than between realty and personalty.

[149] *Supra*, note 31, at 199.

as real estate by one of the beneficiaries would be detrimental to the other beneficiaries.

In our view, this reasoning does not satisfactorily indicate why a distinction should be made between land and pure personalty. The cases in which the rule under consideration has been applied have been ones involving company stock. In those cases, some of the shares were appropriated to the beneficiary and then distributed. Similarly, in the case of land, some of it might be appropriated and distributed to satisfy the beneficiary's share. We realize that these types of disposition might more often give rise to difficulty in the case of land—for example, in the case of a family home—than in the case of other property, such as shares. Yet this will vary with the circumstances, and does not justify a special rule for land.

Despite our general agreement with the preference in favour of the beneficiary claiming distribution, we recognize that there could be circumstances where the detriment to the other beneficiaries would outweigh the detriment to the claimant beneficiary if distribution were refused. Courts have acknowledged that, in certain cases, the rule may defer to "special circumstances".[150] Courts should continue to be permitted to respond to individual situations. In addition, our preference for the beneficiary claiming distribution should be subject to the wishes of the testator.

Consequently, we recommend that, subject to a contrary provision in the will and subject to a court order, a beneficiary of an estate who is absolutely entitled in possession to a share of property, whether land or pure personalty, and whether or not such property is subject to a trust for sale, should be entitled to require that her share be distributed to her even though other shares in the property remain settled and are not yet distributable.

(d) Standardization of Transmission Documents

A great deal of inconvenience in the administration of estates arises out of the fact that financial and other institutions use different forms for the transmission of assets from the deceased to the personal representative or to persons designated by the personal representative. Accordingly, in order to standardize and facilitate such transfers, we recommend that a standard form of transmission be provided for by statute. This document would evidence transfers from the deceased to the estate trustee and from the estate trustee to the ultimate transferee. It would identify the deceased, the estate trustee, the property being transferred, and the transferee; and it should refer to the estate trustee certificate granted to the estate trustee.

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[150] See cases cited in note 31, *supra*.

CHAPTER 6

ESTATE PROCEEDINGS

1. INTRODUCTION

The Ontario Court (General Division) may become involved in estates for various purposes. The most common estate functions of the court are to make grants of letters probate and letters of administration and to "pass" or audit the accounts of personal representatives. Usually, these functions—and, in particular, the former—are essentially administrative in character. They do not involve the court in its more familiar role of adjudicating disputes between opposing parties. The court also serves as a depository for wills.

Less frequently, contentious issues may arise in connection with an estate that do involve the court in its usual capacity. The range of potential issues is considerable. The validity of the will may be contested, in the course of which the testamentary capacity of the testator may be challenged or undue influence may be alleged. Parties may differ over the meaning of the will, and the court may be asked to interpret it. Beneficiaries or creditors may apply to have the personal representatives removed and replaced. An application under Part V of the *Succession Law Reform Act*[1] may be brought for the support of dependants. Under the *Trustee Act*, personal representatives may apply "for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of his ward or his testator or intestate."[2] As we discussed in chapter 4, claims against an estate may be brought by creditors and other claimants.

Until recently, jurisdiction in estates matters was divided among the surrogate courts, the Supreme Court of Ontario, and the District Court of Ontario.[3] The surrogate courts were responsible for granting probate and administration and for passing the accounts of personal representatives; in addition, they heard applications for support under the *Succession Law Reform Act*. Surrogate courts, however, did not have authority to interpret

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[1] R.S.O. 1980, c. 488.

[2] R.S.O. 1980, c. 512, s. 60(1). "Trust" is defined to extend to include "the duties incident to the office of personal representative of a deceased person" (s. 1(q)).

[3] See, generally, Allen, "Estate Jurisdiction of the Surrogate Court and the Supreme Court of Ontario", in Schnurr (ed.), *Estate Litigation* (1987) 1.

wills. The Supreme Court of Ontario had this jurisdiction. Moreover, it also had jurisdiction to try the validity of wills, which was concurrent to that of the surrogate courts.[4] The Supreme Court also had jurisdiction, under the *Trustee Act*, to remove and appoint personal representatives and to make vesting orders.[5]

The fragmentation of jurisdiction in estate matters was complex and dysfunctional. While it may have been understandable as a historical phenomenon, it was not supportable on grounds of policy. The practical consequence of this division of responsibility was that, depending on the particular issues, proceedings in a single estate may have to be brought in different courts before all the outstanding questions could be resolved. If, for example, a question requiring the interpretation of a will arose in the course of a proceeding in the surrogate court—for example, on a passing of accounts—that proceeding would have to be adjourned to allow an application to be brought in the Supreme Court of Ontario to settle it.

With the coming into force of the new "court reform" legislation,[6] the problem of fragmentation has been cured. Surrogate courts have ceased to exist, and their jurisdiction has been transferred to the Ontario Court (General Division). All proceedings involving estates will be brought in the first instance in this court,[7] which will have the authority to deal with all questions that may arise.

While this legislation has satisfactorily resolved the major jurisdictional problem, there are other matters relating to estate proceedings that, in our view, should be addressed. They will be the focus of this chapter.

2. PROPOSALS FOR REFORM

(a) Where Proceedings are Brought

Section 26(1) of the *Estates Act* provides that "an application for a grant of probate or letters of administration shall be made to the Ontario Court (General Division) and shall be filed in the office for the county or district in which the testator or intestate had at the time of death a fixed place of abode".[8] Section 26(2) provides that where, at the time of death, the deceased had no fixed place of abode in or resided out of Ontario, "the

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[4] *Ibid.*, at 4-5.

[5] *Trustee Act*, *supra*, note 2, ss. 5, 10, and 37, as am. by S.O. 1984, c. 11, s. 216.

[6] *Courts of Justice Amendment Act, 1989*, S.O. 1989, c. 55, and *Court Reform Statute Law Amendment Act, 1989*, S.O. 1989, c. 56.

[7] With respect to appeals, see *infra*, this ch., sec. 2(e).

[8] R.S.O. 1980, c. 491, as en. by S.O. 1989, c. 56, s. 48(10). This Act was formerly known as the "*Surrogate Courts Act*"; the statute was renamed by the Court *Reform Statute Law Amendment Act, 1989*, *supra*, note 6, s. 48(25).

application shall be filed in the office for the county or district in which the testator or intestate had property at the time of death". Section 26(3) further provides that "in other cases" the application may be filed in any office. Thus, it would appear that the Ontario Court (General Division) can assume jurisdiction even where the deceased was not resident in Ontario and left no assets in the Province.[9] For example, in such a situation an application for a grant of probate or letters of administration may be brought where a tort action is to be brought by the estate.[10]

With respect to the question of where an application for an estate trustee certificate should be brought, we favour continuation of the basic policy reflected in section 26, subject to two changes. First, the meaning of the phrase "fixed place of abode" in section 26(1) is unclear. Since it probably means residence,[11] we believe that the provision should be amended to make residence the criterion. This concept has been adopted in numerous other Ontario statutes and the rules of court, and appears elsewhere in the *Estates Act*.[12] We therefore recommend that an application for an estate trustee certificate should be filed in the office for the county or district in which the deceased had at the time of death her place of residence. We recommend that subsections (2) and (3) should be retained.

Second, we are of the view that the rules for filing applications for estate trustee certificates that are set out in section 26 should be subject to an exception that would allow an application to be filed elsewhere where it is more convenient. We therefore recommend that, notwithstanding the recommendations made above, the court on motion by any party should be empowered to order that an application for an estate trustee certificate may be filed in an office for another county or district where the balance of convenience substantially favours it.

We have thus far dealt with the place where an application for an estate trustee certificate is filed. In the vast majority of cases, an estate trustee certificate will be granted and the estate will be administered without further involvement of the court, for there will be no disputes concerning the estate.

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[9] Castel, *Canadian Conflict of Laws* (1977),Vol. 2, at 432.

[10] In 1877, the original version of what is now s. 26(3) was added: see *An Act to provide for certain amendments and additions to the Statutes of the Province, as consolidated by the Commissioners appointed for that purpose*, 40 Vict., c. 7 (Ont.), sched. A, item 60. Although this change appeared to envisage that probate or letters of administration might be granted even though the deceased left no property in Ontario, the provision defining the jurisdiction of the surrogate courts continued to refer to the deceased "having estate or effects in Ontario" until 1910 (*The Surrogate Courts Act*, S.O. 1910, c. 31, s. 19). The purpose of the 1877 change is thus difficult to determine. Modern commentators consider that s. 26 deals with questions of international jurisdiction, as well as domestic jurisdiction: Castel, *supra*, note 9, at 430.

[11] Castel, *ibid.*

[12] *Estates Act*, *supra*, note 8, ss. 26(2), as en. by S.O. 1989, c.56, s. 48(10), ss. 35(1), 36, and 74(7).

If a contentious issue does arise, the proceedings will be held in the county or district in which the application has been filed.

Under the rules of court applicable to actions brought in the Ontario Court (General Division), the court may make an order changing the place of trial from the place named in the plaintiff's statement of claim.[13] The court may order a change where it is satisfied that the balance of convenience substantially favours the holding of the trial at another place, or it is likely that a fair trial cannot be had at the place named. However, this rule would not apply to applications for an estate trustee certificate.[14] In our view, this policy should apply to proceedings arising under the *Estates Act*. We therefore recommend that, in contentious proceedings under the *Estates Act*, the court on motion by any party should be empowered to order that the proceedings be held at a place other than the county or district in which the application for an estate trustee certificate is filed where it is satisfied that the balance of convenience substantially favours holding the proceedings at another place, or it is likely that a fair trial cannot be had in the county or district in which the estate trustee certificate is filed.

(b) Powers of the Court

Courts exercising jurisdiction in estates administration should possess the powers necessary to respond effectively to any problem that may arise. We have been informed by estates practitioners that, in Ontario, this is not the case at present.[15] After considering the system in place under the *Estates Act*, we concluded that the answer is to grant certain powers to the Ontario Court (General Division).

Under the *Estates Act* and the rules governing proceedings under that Act[16] – formerly known as the "Rules of Practice – Surrogate Court" – provision is made for a variety of citations. Essentially, a citation is an order calling for a party to enter an appearance or to take certain action in specific situations.[17] Where a citation is issued in connection with an application, the person cited is usually advised of the nature of the application and the consequences of failing to obey the order.

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[13] O.Reg. 560/84, r. 46.03. Formerly, the rules of court were known as the "Rules of Civil Procedure". This was changed in 1989: *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 160a, as en. by S.O. 1989, c. 55, s. 31.

[14] An application for letters of representation would not be an "action" within the definition of "action" in the rules of court, *ibid.*, r. 1.03.1.

[15] One problem is the difficulty of obtaining information, or indeed even a response, from unco-operative personal representatives. We have made recommendations to require estate trustees to give information to beneficiaries and creditors: *supra*, ch. 2, sec. 3(b).

[16] Rules Governing Proceedings Under the *Estates Act*, R.R.O. 1980, Reg. 925 (hereinafter referred to as "Estates Rules").

[17] Hull and Cullity, *Macdonell, Sheard and Hull on Probate Practice* (3d ed., 1981), at 322.

Citations are granted without notice by a judge, based upon an affidavit stating the facts upon which the citation is founded. As a matter of practice, duplicate copies of the draft order and the accompanying affidavit are submitted to the local registrar, who presents them to the judge for signature. There is neither a separate application for the order nor a personal appearance before the judge. In essence, the procedure is administrative.

A lengthy exposition would be required to discuss each of the common types of citation in any detail. For our purposes, a few examples will suffice.[18]

Certain citations are sought to compel disclosure of information. Where, for example, a beneficiary believes that someone has custody of the will, she may obtain a citation from the judge, ordering that person to deposit the will in the office of the registrar.[19] Alternatively, where a judge is satisfied that a person has knowledge of a will or any document or asset relating to an estate, a summons may require that person to be examined.[20] A citation may order a personal representative to deposit a detailed list of the assets of the estate in the office of the registrar.[21]

Citations may also be issued to facilitate the conduct of proceedings: where a party seeks to revoke a grant of probate or administration, a citation may require the personal representative to bring the grant into the office of the registrar.[22] Finally, citations are an integral feature of contentious proceedings. In an application for proof of a will in solemn form or for revocation of probate or in any proceedings where the validity of a will is contested, all interested persons must be made parties to the proceedings. Such persons must be served with a citation calling upon them to enter an appearance and warning them that, if they do not, they nonetheless will be bound by the proceedings.[23]

We believe that it would be useful to supplement the various specific citations with an additional judicial power that can be exercised at any stage during the administration of the estate.

Circumstances may arise, particularly before an estate trustee certificate is granted, where, in order to preserve assets or protect the rights of interested persons, it may be necessary to restrain any dealing or intermeddling with the property of a deceased person or with assets that might be held

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[18] For a description, see Hull and Cullity, *supra*, note 7, at 322-29, and *The Permanent's Surrogate Guide* (1984), at 27-29.

[19] *Estates Act*, *supra*, note 8, s. 31(1), Estates Rules, *supra*, note 16, r. 49 and Form 36.

[20] *Estates Act*, *supra*, note 8, s. 31(2), and Estates Rules, *supra*, note 16, r. 50.

[21] Estates Rules, *supra*, note 16, r. 51 and Form 40. See, also, r. 52.

[22] Estates Rules, *supra*, note 16, r. 56 and Form 39.

[23] *Estates Act*, *supra*, note 8, s. 47 and Estates Rules, *supra*, note 16, rr. 46 and 47, and Form 30.

ultimately to be part of the estate. Disappearance or mismanagement of assets would concern beneficiaries, creditors, and dependants who might be entitled to support under Part V of the *Succession Law Reform Act*. While they may have recourse to the existing judicial causes of action that may lead to an award of damages, as a practical matter, such relief may come simply too late. At present, only dependants enjoy a degree of protection under the law. The *Estates Act* does not address this problem generally and the existing procedural devices—the caveat and the citation—are unequal to the task.

Under Part V of the *Succession Law Reform Act*, any application to the court by or on behalf of a dependant may result in an order suspending the administration of the estate, in whole or in part, for such time and to such an extent as it may decide.[24] Further protection is afforded if a certified copy of this order is served on any person or corporation enjoining the payment or transfer of funds or property that otherwise would have taken place as a result of transaction entered into by a deceased before her death.[25] Regardless of whether a suspensory order has been obtained, where an application for support is made and notice of it is served on the personal representative, she cannot thereafter proceed with the distribution of the estate, save with the consent of all the persons entitled to apply for support, or under a court order.[26]

While the protection provided to dependants is not comprehensive, they are nevertheless in a more favourable position than creditors or beneficiaries, who are able to avail themselves of the existing remedies only after the assets may have been dissipated. We agree with the salutary policy reflected in Part V of the *Succession Law Reform Act*, and believe that it should be extended to all persons who might be prejudiced by the mismanagement of estate assets.

We therefore recommend that, in all cases where it appears to the court to be necessary for the grant of an estate trustee certificate, the inventory and preservation of the assets of the estate of the deceased, the distribution of assets, or the management of the estate, the court should be empowered to require any person to do or to refrain from doing any act, either unconditionally or upon such terms or conditions as the court deems just, or to attend to be examined by the court. We further recommend that an application for the court to exercise this power may be brought by the estate trustee, any person who appears to have an interest in the estate, or a dependant of the deceased as defined in Part V of the *Succession Law Reform Act*.

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[24] *Supra*, note 1, s. 59.

[25] *Ibid.*, s. 72(5) and (6).

[26] *Ibid.*, s. 67(1). However, there is an exception for "reasonable advances for support to dependants who are beneficiaries" (s. 67(2)).

We believe that it would be useful to give the court a general power to order that notice be given to persons who should be made parties to proceedings or who are otherwise affected by them. Accordingly, we recommend that the rules of court should provide that, where the court determines that notice of the proceedings is necessary for the proper disposition of any matter before it, the court should be empowered to order notice to any person, including the Official Guardian or the Public Trustee.

(c) Depository Function of the Court

In Ontario, there are basically three ways to safeguard a will. First, the testator may preserve it in a place thought appropriate; this may be at home or in a safety deposit box. Second, the testator may choose to leave the will in the office of a lawyer or a trust company. Third, the will may be deposited in the office of the local registrar of the Ontario Court (General Division).

Where the testator retains the will, it is readily available for revocation or the addition of a codicil. It is, however, also more easily lost or misplaced, particularly where the testator has told no one of its existence or location. Another danger is the accessibility of the will to persons who may wish to suppress it.

Leaving the will in the custody of the solicitor certainly provides greater assurance against the will being suppressed by interested persons or lost through inadvertence. The difficulty with this alternative is that the high degree of mobility in our society may demand that inquiries be made in the various places where the deceased has resided in order to locate her last will. Another problem may arise where the lawyer dies, retires, or simply ceases to practice, or where a trust company closes a particular office, since there is no procedure in Ontario under which the wills that have been stored may be transferred to another place. By contrast, under the Saskatchewan *Surrogate Court Act*,[27] in similar circumstances, the will may be deposited with the registrar for safekeeping without specific authority of the testator.[28]

Under the Ontario *Estates Act*, wills may be deposited for safekeeping at the office of the local registrar of the Ontario Court (General Division).[29]

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[27] R.S.S. 1978, c. S-66, s. 12(3), as am. by S.S. 1979-80, c. 92, s. 93(7)(c).

[28] Section 12(3) of the Act provides as follows:

> 12.–(3) A solicitor retiring from practice, the personal representative of a deceased solicitor, a trust company that has ceased to have an office in the province or which has ceased to be an approved trust company, or the liquidator or receiver of a trust company, may deposit with the local clerk for safekeeping any will in the custody of the solicitor, personal representative or trust company, without specific authority from the testator, and the local clerk shall accept for safe keeping any will tendered to him for that purpose. When a will deposited under this subsection is withdrawn from his custody, a fee of $1 shall be paid to the local clerk.

[29] *Estates Act*, *supra*, note 8, s. 17, as en. by S.O. 1989, c. 56, s. 48(7).

The operation of the wills depository is governed by the rules governing proceedings under the *Estates Act*, which attempt to ensure the confidentiality of the content of the will.[30]

Depositing a will with the local registrar ensures that it will not be suppressed or lost. However, it cannot guarantee that it will be located if the testator has moved from the county or district in which it had been deposited, for there is no central registry of deposited wills in Ontario. Furthermore, once a will is deposited, it becomes somewhat more difficult for a testator to revoke or alter it.

In 1990, we conducted a survey to ascertain the extent to which wills are being deposited for safekeeping at local offices of the Ontario Court (General Division). We discovered that there has been virtually no use of the court as a depository, except in certain very large urban centres. Even in these centres, relatively few wills have been deposited for safekeeping.[31]

The Commission favours the court continuing to serve as a depository for wills. For persons who wish secure storage for their wills, but do not wish to leave them with their solicitors, a court depository provides a practicable alternative. It also is an alternative for solicitors who do not wish to retain original wills in their custody and who are concerned about leaving them with their clients. Other provinces, including Alberta, Saskatchewan, and Manitoba,[32] have established a will depository. We therefore recommend

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[30] Estates Rules, *supra*, note 16, rr. 64-67. Rule 64 provides that every will deposited for safe keeping must be enclosed in an envelope that is securely sealed with the name and address of the testator and the executor or executors endorsed on it. Under r. 66(1), a will that has been deposited for safe keeping cannot be removed, copied or inspected during the lifetime of the testator, except by the testator in person or, upon order of the judge, by a solicitor acting on the written authority of the testator. After the death of the testator, the will must be delivered to the executor, upon his personal application, or to such other person as the judge directs (r. 66(2)).

[31] In March, 1990, before the coming into force of the *Courts of Justice Amendment Act, 1989*, *supra*, note 6, and the *Court Reform Statute Law Amendment Act, 1989*, *supra*, note 6, we wrote to each local surrogate court office in Ontario, asking the registrar how many wills have been deposited for safekeeping in a single year. The responses indicated that in certain counties and districts no wills at all have been deposited for many years. In other counties and districts, only 1 or 2 wills have been deposited annually. The only jurisdictions where there is a departure from the general trend are the Judicial District of Ottawa-Carleton, the County of Essex, which includes Windsor, and the Judicial District of York, which includes the Municipality of Metropolitan Toronto. In Essex County, approximately 12 wills are deposited annually. In the Judicial District of York, approximately 150 wills are deposited each year. In the District of Ottawa-Carleton, 230 wills were deposited in 1989, 140 in 1988, and 81 in 1987.

We wish to acknowledge with gratitude the generous assistance of the registrars, deputy registrars, and other court officials in the local offices throughout the Province.

[32] *Surrogate Court Act*, R.S.A. 1980, c. S-28, s. 6(4); *The Surrogate Court Act*, *supra*, note 27, s. 12(2), as am. by S.S. 1979-80, c. 92, s. 93(7)(b); and *The Court of Queen's Bench Surrogate Practice Act*, R.S.M. 1987, c. C290, s. 3(1).

that the depository function be continued in the local offices of the Ontario Court (General Division).

However, we believe that the existing system should be improved. In our view, its most glaring deficiency is that, unless every local court office is searched, there is no assurance that the last will of the deceased will be found in a case where the testator has moved to another county or district. This problem can be readily solved by requiring local registrars of the Ontario Court (General Division) to give notice of the deposit of a will to the Estate Registrar for Ontario.[33] A search in the office of the Estate Registrar for Ontario would indicate whether a will has been deposited and the local office in which it can be found. We therefore recommend that the local registrar should be required to give notice of the deposit of a will to the Estate Registrar for Ontario.

One reason for the failure of Ontario lawyers to deposit wills may simply be that many are unaware that the court has a depository function under the *Estates Act*. To ensure use of the improved system that we have proposed, we recommend that extensive publicity should be given to the depository function of the Ontario Court (General Division).

One of the difficult questions we have considered is whether it was proper for a solicitor or trust company having possession of wills to deposit them with the local registrar without the prior consent of testators. Permitting wills to be deposited without the consent of testators undoubtedly would have certain advantages; it would be administratively attractive and would facilitate recourse of the depository. Yet we cannot endorse it. Given the intensely personal nature of wills and the familial and other sensitivities associated with them, we are of the view that it would be inimical to the integrity of the fiduciary relationship between a testator and her solicitor or trust company if wills could be deposited without her express authorization. Accordingly, we recommend that, subject to the prior consent of the testator, any person or institution having original wills in her or its possession should be authorized to deposit them with the local registrar.

To this requirement of consent we wish to propose a single exception. The approach taken in the Saskatchewan *Surrogate Court Act*[34] commends itself to us, for it recognizes that circumstances may arise where it is not practicable to secure the consent of testators. In such a situation it would be useful if those with custody of wills were able to deposit them with the

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[33] Implementation of this recommendation would establish a system, similar to that established by ss. 41-45 of the *Estates Act*, *supra*, note 8. Under these provisions, local registrars must give notice of every application for a grant of probate or administration to the Estate Registrar for Ontario, who must keep them on file. In the absence of a special court order, probate or administration cannot be granted unless the local registrar has received a certificate from the Estate Registrar for Ontario stating that no other application appears to have been made in relation to the property of the deceased.

[34] See s. 12(3) of the *The Surrogate Court Act*, reproduced in note 28, *supra*.

court. We therefore recommend that a solicitor retiring from practice, the estate trustee of deceased solicitor, a trust company that has ceased to have an office in the province or that has ceased to be an approved trust company, or a liquidator or receiver of a trust company, should be permitted to deposit with the local registrar for safekeeping any will in her or its possession without specific authority from the testator, and the local registrar should be required to accept for safekeeping any will tendered to her for that purpose.[35]

(d) Passing of Accounts

The expression "passing of accounts" refers to the process by which a personal representative submits formal accounts relating to the administration of the estate to the court for examination and approval. Should the judge approve or "pass" the accounts, either in the form in which they are presented or in an amended form, the administration of the estate for the period covered by the accounts will also be approved, effectively immunizing the executor or administrator from personal liability.[36]

As we explained in chapter 2,[37] personal representatives have a duty to maintain accounts. Accounts may be passed in two situations; personal representatives may either pass them voluntarily or be compelled by interested persons to pass them.

Personal representatives may choose to pass their accounts in order to "close the books on that time frame of the administration"[38] and obtain compensation for their efforts.[39] The alternative to a court passing would be to present the accounts to the estate beneficiaries for their approval, and ask them to sign releases discharging them from personal liability. This alternative, however, is efficacious only where all the beneficiaries are known, are under no legal disability, and are willing to accommodate the executor or administrator. A personal representative who secures releases from all the adult beneficiaries nonetheless will remain exposed to possible

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[35] Wills deposited pursuant to this recommendation would, of course, be governed by the rules respecting confidentiality: see discussion, *supra*, note 30.

[36] The accounts, however, may subsequently be opened in the case of fraud or mistake.

[37] *Supra*, ch. 2, sec. 3(b).

[38] Armstrong, *Estate Administration* [:] *A Solicitor's Reference Manual* (1984), at 4.2.1. One of two or more executors can seek separate approval for her dealings with the estate: *Cunnington v. Cunnington* (1901), 2 O.L.R. 511 (C.A.), at 516.

[39] Rule 59 of the Estates Rules, *supra*, note 16, states that "[e]xecutors, administrators, trustees under a will and guardians of infants may pass their accounts voluntarily or they may be called upon by citation to do so on the application of any person interested therein". See, also, *Trustee Act*, *supra*, note 2, s. 23, which deals with the passing of accounts by a trustee.

future claims by beneficiaries who cannot give releases, such as unborn or minor beneficiaries.[40]

Under the *Estates Act* and rules governing proceedings under that Act, an executor or administrator may be compelled to pass her accounts by interested persons.[41] Section 64 of the Act states that the oaths that must be taken by personal representatives and guardians require them to "render a just and full account of [their] executorship, administration or guardianship only when thereunto lawfully required". Section 75(1) provides that "[a]n executor or an administrator shall not be required by any court to render an account of the property of the deceased, otherwise than by an inventory thereof, unless at the instance or on behalf of some person interested in such property or of a creditor of the deceased, nor is an executor or administrator otherwise compellable to account before any judge".[42] Rule 59 provides that an executor or administrator may be required by citation to pass her accounts on the application of an interested person.[43] The right to compel a passing of accounts is subject to the discretion of the court, which may refuse to issue a citation to the personal representative.[44]

The *Estates Act* addresses the jurisdiction and powers of a judge on a passing of accounts[45] and the question of who should receive notice of the passing.[46] Among the matters addressed by the rules made under that Act are the procedure for obtaining and serving an appointment for the passing of accounts[47] and the form of the accounts.[48]

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[40] For a discussion, see Schnurr, "Passing Trustees' Accounts in Court", in Schnurr (ed.), *Estate Litigation* (1987) 71, at 71-73.

[41] See, generally, Hull and Cullity, *supra*, note 17, at 373-74, and Schnurr, *supra*, note 40, at 73-74.

[42] Section 73 states that "[a]n executor who is also a trustee under the will may be required to account for his trusteeship in the same manner as he may be required to account in respect of his executorship". Trustees of an *inter vivos* trust cannot be compelled to pass their accounts under the existing law, except where the trust instrument so provides: see Ontario Law Reform Commission, *Report on the Law of Trusts* (1984), Vol. 1, at 254.

[43] In identifying who may compel a passing of accounts, there is a difference in language between s. 75(1) of the *Estates Act* and r. 59 of the Estates Rules, *supra*, note 16. The former refers to a person interested in the property of the deceased. The latter confers the right on a person interested in the "accounts": for a discussion, see Baker, *Widdifield on Executors' Accounts* (5th ed., 1967) (hereinafter referred to as "Widdifield"), at 352, and Hull and Cullity, *supra*, note 17, at 374.

[44] Widdifield, *supra*, note 43, at 356-58, and Hull and Cullity, *supra*, note 17, at 373.

[45] *Estates Act*, *supra*, note 8, s. 74(3), as en by S.O. 1989, c. 56, s.48(21), and 74(4).

[46] *Ibid.*, s. 74(7). For persons entitled to notice who are under a legal disability, see s. 74(8) and (9). Section 74(8) provides that notice is to be served upon the Official Guardian where a person entitled to notice of the passing is a minor or is of unsound mind and is not a patient in a psychiatric facility. Section 74(9) provides that notice is to be served upon the Public Trustee where a person entitled to notice is a patient in a psychiatric facility.

[47] Estates Rules, *supra*, note 16, r. 60, as en. by O.Reg. 845/82. s.3.

[48] *Ibid.*, r. 61.

The nature of the passing of accounts proceeding cannot easily be categorized. Indeed, in 1960, Macdonell Surr. J. observed that "the passing of accounts was not a motion, a trial, or a reference".[49] He explained that "[t]he procedure . . . designed many years ago was a simple, inexpensive and informal procedure to enable an executor to obtain his discharge and have his compensation fixed and costs taxed".[50] Apparently, the practice in Ontario varies among the counties and districts.[51]

Section 74(3) of the *Estates Act* provides that on a passing the court "has jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and its administration and disbursement."[52] Several decisions have considered the nature of this jurisdiction in the context of dealing with the passing of accounts before surrogate court judges. In an important decision, *Re MacIntyre*,[53] Meredith C.J. explained that the purpose of an earlier version of this provision was "to enable [the judge] to enter into any question which it was necessary for him to deal with in order to determine how much the personal representative had received or ought to have received and to be charged with, and to credit him with what he properly had paid, so as to ascertain the balance with which he was chargeable".[54] He held that, while the surrogate court had jurisdiction to determine the propriety of a creditor's claim that had been paid by a personal representative and to allow or disallow the item in the accounts, it had no jurisdiction to call upon an unpaid creditor to make her claim and to adjudicate upon it.

Other cases elaborated on a court's jurisdiction on a passing of accounts. That jurisdiction comprehends allowing or disallowing a retainer by an executor to pay her own claim against the estate,[55] and determining the ownership of certain mortgages, where they had been taken jointly in the

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[49] *Re Willumsen*, [1960] O.W.N. 91 (Surr. Ct.), at 92, aff'd [1960] O.W.N. 92 (C.A.).

[50] *Ibid.*

[51] With respect to the practice on the hearing, see, generally, Widdifield, *supra*, note 43, at 361-65, and Schnurr, *supra*, note 40, at 80-82.

[52] *Estates Act*, *supra*, note 8, s. 74(3), as en. by S.O. 1989, c. 56, s. 48(21). The first version of s. 74(3) was introduced by *An Act to amend The Surrogate Courts Act*, S.O. 1905, c. 14, s. 1, which added s.s. (3) to s. 72 of *The Surrogate Courts Act*, R.S.O. 1897, c. 59. Subsection (3) was enacted in response to *Re Russell* (1904), 8 O.L.R. 481 (Div. Ct.), which had held that, on a passing of accounts, a surrogate court judge did not have jurisdiction to decide whether the estate included an amount that one of the executors had claimed was an *inter vivos* gift to her from the testator.

[53] (1906), 11 O.L.R. 136 (Div. Ct.).

[54] *Ibid.*, at 139. Earlier, he said that "the purpose of the amending section was only to enlarge the powers of the Judge, so as to enable him to take the accounts of the receipts and disbursements of the executors" (*ibid.*, at 138). See, also, *Oke v. Oke* (1915), 8 O.W.N. 180 (H.C. Div.).

[55] *Shaw v. Tackaberry* (1913), 29 O.L.R. 490, 15 D.L.R. 475 (App. Div.). For a discussion of the right of retainer, see *supra*, ch. 2, sec. 3(d).

names of the deceased and another individual.[56] A court may conduct a full inquiry into the rights of the deceased at the time of her death to property owned her during her lifetime, which came into the possession of her executors prior to her death, and which is alleged by them to be *inter vivos* gifts; if the court finds that the deceased was entitled to the property, it can order an accounting by the executors.[57] On a passing of accounts, a judge has power to decide whether payments should be charged to the income account or the capital account of the estate.[58]

In 1933,[59] additional powers were conferred on surrogate court judges, which now appear in section 74(4) of the *Estates Act* as follows:

> 74.—(4) The judge, on passing any accounts under this section, has power to inquire into any complaint or claim by any person interested in the taking of the accounts of misconduct, neglect, or default on the part of the executor, administrator or trustee occasioning financial loss to the estate or trust fund, and the judge, on proof of such claim, may order the executor, administrator or trustee, to pay such sum by way of damages or otherwise as he considers proper and just to the estate or trust fund, but any order made under this subsection is subject to appeal.

Where there is a complaint or claim, the judge may order the trial of an issue, in which case "he shall make all necessary directions as to pleadings, production of documents, discovery and otherwise in connection with the issue".[60]

In examining the passing of accounts in Ontario, the threshold question that we considered was whether the fundamental nature of the process should continue. The most salient feature of our system is that, for the most part, effective scrutiny of the personal representative's accounts and dealings with the estate depends on the vigilance of interested persons. Unless they contest any aspect of the accounts presented, the judge can acquire only the most superficial knowledge of the state of the accounts and the administration of the estate. She is in no position to conduct an effective investigation on her own initiative concerning the management of the estate assets. While the *Estates Act* does give the judge authority to "appoint an accountant or other skilled person to investigate and to assist him in auditing the accounts", the exercise of this power is confined to circumstances "[w]here accounts

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[56] *Re Baechler* (1931), 66 O.L.R. 483, [1931] 2 D.L.R. 997 (H.C. Div.).

[57] *Re Estate of Taerk*, [1957] O.R. 482, 9 D.L.R. (2d) 601 (C.A.).

[58] *Leonard v. Crown Trust and Guarantee Co.*, [1949] O.R. 678, [1949] 3 D.L.R. 815 (C.A.).

[59] See *The Surrogate Courts Act, 1933*, S.O. 1933, c. 63, which added clause (a) to s. 65(3) of *The Surrogate Courts Act*, R.S.O. 1927, c. 94.

[60] *Estates Act*, *supra*, note 8, s. 74(5).

submitted . . . are of an intricate or complicated character and in his opinion require expert investigation".[61]

At present, the most useful review of accounts occurs where a person under a legal disability has an interest in the accounts. In such a case, depending on the particular circumstances, notice of the passing must be given either to the Official Guardian or the Public Trustee.[62] These offices conduct an independent review of the accounts.

We have considered the possibility of generalizing this policy by giving a judge of the Ontario Court (General Division) jurisdiction to conduct an independent review of accounts, analogous to that undertaken by the Public Trustee or the Official Guardian. Such a jurisdiction would be particularly useful where a passing of accounts is uncontested; it could be used to determine whether the estate has been administered properly and whether the compensation claimed is "fair and reasonable".[63] Conferring such a power undoubtedly would fundamentally change the role of the court on a passing of accounts.

We have also considered whether there should be a statutory requirement that accounts be passed at a fixed interval, or within a certain period from the grant of an estate trustee certificate.[64] Providing for mandatory passing of accounts would make the review function more effective by subjecting all accounts to judicial scrutiny.

In the end, we have come to the conclusion that the fundamental character of the passing of accounts procedure should not be altered. Primary responsibility for policing the management of estate assets should remain with interested persons—that is, beneficiaries and creditors—except, of course, where an interested person is under a legal disability. This report has reflected our conviction that the court should not be charged with the task of ongoing supervision of estates, but should intervene only when it is asked to do so by an interested person. We do not believe that a sufficiently strong reason exists to depart from that general principle in this context. This is essentially a private matter between the estate trustees and the persons interested in their administration of the deceased's estate.

Similarly, we have rejected mandatory passing of accounts after fixed time periods. We suggest that such a requirement would add to the expense of estate administration, as well as increase court costs, in return for what

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[61] *Ibid.*, s. 74(12).

[62] *Ibid.*, s. 74(8) and (9).

[63] *Trustee Act*, *supra*, note 2, s. 61(1).

[64] See, for example, *Trustee Act*, R.S.B.C. 1979, c. 414, s. 101(1), which requires personal representatives to pass their accounts within 2 years from the date of the granting of probate or administration, or within 2 years from the date of appointment, unless the accounts are approved in writing by all the beneficiaries or the court otherwise orders.

would be marginal advantages in enforcement. On the whole, we are of the view that the existing system works adequately; a dramatic intervention by the legal system in the relationships between estate trustees and beneficiaries and creditors would be unjustifiable.

Notwithstanding our general satisfaction with the philosophy underlying the existing approach, we are of the view that the procedure by which accounts are approved should be restructured. We believe that there should be a passing of accounts, with attendances before a judge, only where there is a dispute in connection with the accounts or the conduct of the estate trustees. At present, there is no assurance that this will be the case; beneficiaries may wish to attend a passing simply to obtain information that otherwise would have been willingly given or to recover the costs of having their lawyers review the accounts. In our view, it is a waste of scarce and valuable judicial resources to conduct a hearing where there is no dispute to adjudicate. At the same time, we consider that it would be salutary to facilitate, if not encourage, the submission of accounts to interested persons so that they would, in fact, have an opportunity to challenge the administration of an estate in appropriate cases.

In furtherance of these views, we favour the establishment of a filing of accounts procedure. This new procedure will allow accounts that are not contested to be approved by the court in an expeditious manner without a passing before a judge. The estate trustee will be required to pass her accounts only where there is a dispute.

The filing of accounts procedure that we recommend is as follows:[65]

1. An estate trustee and an interested person is entitled to a passing of accounts only after the accounts have been filed in accordance with the following procedure.

2. An estate trustee may file her accounts voluntarily with the local registrar of the Ontario Court (General Division) or she may be required to file the accounts upon the application to the court of an interested person. The estate trustee must file the accounts, verified by affidavit, a copy of the estate trustee certificate, and a copy of the previous order, if any, made on a filing or passing of accounts in the estate.

3. Upon filing the accounts, the estate trustee must give notice of the filing to the persons entitled to receive notice of a passing of accounts under section 74(7) of the *Estates Act*. Where the person entitled to notice is a person under a disability, notice should be given to either the Official Guardian or the Public Trustee, as required under the

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[65] In 1975, a filing of accounts procedure was proposed by a Special Committee of the Wills & Trusts Section, of the Canadian Bar Assocation, Ontario Branch. The Chair was Mr. Strachan Heighington, Q.C.

Estates Act.[66] The form of the notice and the method of service should be prescribed by regulation. At a minimum, the notice must be accompanied by a copy of the accounts and a schedule of the compensation claimed and any claim for costs. The notice should advise recipients that, if no interested person gives notice that she requires that the accounts be passed before a judge within 45 days of the date of filing, the accounts and draft order approving them will be presented by the local registrar to a judge for approval as an unopposed application. A person who has received notice of the filing is entitled to require a passing of accounts within 45 days of the date of the filing. The form of the notice requiring a passing of accounts should be prescribed by regulation.

4. Notwithstanding paragraph 3, the court, upon application, may give directions with respect to service of the notice of filing, and may dispense with service of the notice of filing or the copy of the accounts, or both. Where the court dispenses with the service of the copy of the accounts, a person who is entitled to notice of the filing, or her solicitor, is entitled to examine the accounts at the office of the local registrar.

5. Upon filing proof of service, and, where a person under a disability is entitled to notice, a certificate of the Official Guardian or Public Trustee stating that the accounts have been examined and there is no objection, the estate trustee may apply after 45 days from the date of filing, to a judge, without notice, for an order approving the accounts as filed, provided that there is no notice requiring the judge to pass the accounts.

(e) Appeals

Depending on the particular issue, appeals in estates matters may be governed by the *Courts of Justice Act, 1984*,[67] the *Estates Act*, or the *Succession Law Reform Act*.

The *Courts of Justice Act, 1984* applies to appeals generally, and establishes the grounds for appeal to the Court of Appeal, the Divisional Court, and the Ontario Court (General Division). It would apply in estates where the more specific provisions of the *Estates Act* and the *Succession Law Reform Act* are inapplicable.

Section 33(1) of the *Estates Act* gives any person or party taking part in a proceeding under that Act a right of appeal to the Divisional Court

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[66] *Supra*, note 8, s. 74(8) and (9).

[67] *Supra*, note 13.

"from an order, determination or judgment of the Ontario Court (General Division) if the value of the property affected . . . exceeds $200".[68]

Section 77 of the *Succession Law Reform Act* provides that an appeal from an order under Part V of the Act, which is made by the Ontario Court (General Division), lies to the Divisional Court.

The diversity of appeal routes in estate proceedings is unnecessarily complex and confusing. Moreover, with the abolition of the surrogate courts and the transfer of surrogate court jurisdiction to the Ontario Court (General Division), we can see no principled reason why appeals in certain estates matters should be treated differently from other estate matters, or indeed other civil proceedings brought before the Ontario Court (General Division). Consequently, there is no justification for retaining the requirement in the *Estates Act* that the value of the property in issue exceed $200.[69] Under the *Courts of Justice Act, 1984*, the amount that determines which appeals of final orders may be heard by the Ontario Court of Appeal, rather than the Divisional Court, is $25,000.[70] The Act also provides that the monetary threshold for appeals of final orders of the Small Claims Court to the Divisional Court is $500.[71]

We have concluded that appeals in estate matters should be governed by the general provisions respecting appeals set out in the *Courts of Justice Act, 1984*. We therefore recommend that section 33(1) of the *Estates Act* should be amended to state that an appeal by any party or person taking part in a proceeding under this Act from an order of the Ontario Court (General Division) is governed by the *Courts of Justice Act, 1984*.[72] This would, of course, remove the $200 requirement. We also recommend that section 77 of the *Succession Law Reform Act* should be amended to state that an appeal from an order of the Ontario Court (General Division) made under Part V is governed by the *Courts of Justice Act, 1984*.

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[68] *Estates Act*, *supra*, note 8, s. 33(1), as en. by S.O. 1989, c. 56, s. 48(14).

[69] This requirement was introduced in 1859: *The Surrogate Courts Act*, C.S.U.C. 1859, c. 16, s. 26.

[70] An appeal lies to the Divisional Court from a final order of a judge of the General Division where the order involves not more than $25,000, exclusive of costs: *Courts of Justice Act, 1984*, *supra*, note 13, s. 18(1), as en. by S.O. 1989, c. 55, s. 2. An appeal lies to the Court of Appeal from a final order of a judge of the Ontario Court (General Division), except a final order for a single payment of not more than $25,000, exclusive of costs: *ibid.*, s. 6(1)(b), as en. by S.O. 1989, c. 55, s. 2.

[71] Section 30 of the *Courts of Justice Act, 1984*, *supra*, note 13, as en. by S.O. 1989, c. 55, s. 2, states that "[a]n appeal lies to the Divisional Court from a final order of the Small Claims Court in an action, (a) for the payment of money in excess of $500, excluding costs; or (b) for the recovery of possession of personal property exceeding $500 in value".

[72] Implementation of this recommendation would necessitate consequential amendments to s. 33 of the *Estates Act*, *supra*, note 8, as am. by S.O. 1989, c. 56, s. 48(14).

(f) Fees

Proceedings under the *Estates Act* are subject to a special schedule of fees,[73] which formerly applied to the surrogate courts. This schedule differs from the schedule applicable to other proceedings in the Ontario Court (General Division), including other proceedings involving estates. The former schedule provides for a sliding scale, so that the fees payable increase with the value of the estate being administered.[74] By contrast, fees for other proceedings in the Ontario Court (General Division) bear no relation to the value of the claim or property in issue.[75]

It is difficult to discern a principled justification for the schedule of fees applicable to matters within the purview of the *Estates Act*. In granting probate or administration to a personal representative, the effort required on the part of the court does not increase with the value of the estate. Indeed, a very valuable estate may simply consist of insurance proceeds or real property that is owned jointly by husband and wife. Proceedings in the Ontario Court (General Division) involve widely disparate amounts and a range of complexity of issues. Yet neither factor affects the amount of court fees payable by litigants.

The only rationale for the graduated fee schedule appears to be that it has been regarded as a suitable vehicle for raising revenue. While this is certainly understandable on a pragmatic level, we are of the view that it is inappropriate to single out certain uses of our court system in this manner. Court fees should be established in a consistent manner for those who consume this public service, especially for matters coming before the same court. We therefore recommend that Appendix C to the rules governing proceedings under the *Estates Act* should be amended so that fees in relation to matters comprehended by the *Estates Act* are set in the same manner as for other proceedings brought in the Ontario Court (General Division).

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[73] O. Reg. 393/90, s. 2. These fees are established under the *Administration of Justice Act*, R.S.O. 1980, c. 6, s. 7(c).

[74] The fee on grants of probate and administration is $5 for every $1,000 or part thereof of the estate being administered.

[75] O. Reg. 393/90, s. 1.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 1: INTRODUCTION

1. The legislation bearing directly upon the administration of estates of deceased persons—the *Estates Act*, the relevant provisions of the *Trustee Act*, and the *Estates Administration Act*—should be consolidated in a single statute.

CHAPTER 2: THE OFFICE OF PERSONAL REPRESENTATIVE: THE ESTATE TRUSTEE

The Nature of the Office

2. The office of the personal representative should be generally assimilated to that of a trustee, in accordance with the recommendations that follow.

3. The special rights, duties, and powers of personal representatives as the *alter ego* of the deceased in relation to the administration of the estate should be expressly provided for by legislation.

4. The differences in the law between the offices of administrator and executor should be abolished, except for the difference relating to the manner in which persons are appointed to the offices.

5. A personal representative should be called an "estate trustee", and this term should be defined to mean:

   (a) the person named in the last will and testament of the deceased to represent her on her death, and

   (b) the person appointed by a court of competent jurisdiction to represent the deceased on her death.

6. The estate trustee should hold the deceased's estate upon the following trusts:

   (a) to exercise the powers conferred on her by law and by the will;

   (b) to carry out the obligations imposed on her by law and by the will;

(c) to get in the estate of the deceased;

(d) to pay the debts of the deceased in accordance with the obligations imposed on her by law and by the will; and

(e) to distribute the estate of the deceased in accordance with the law and the will.

7. Letters probate and letters of administration should be replaced by a single document issued by the court, to be called an "estate trustee certificate".

ACCESSION TO THE OFFICE

8. (1) The person named in the will of the deceased should be granted an estate trustee certificate and be appointed estate trustee. The beneficiaries should not be entitled to challenge the accession on any grounds, other than the ground of incapacity or legal disqualification.

(2) The estate trustee named in the will should continue to derive power from the will, and should be entitled to begin acting immediately upon the death of the deceased.

9. In cases where there is a will, but it is necessary for the court to appoint an estate trustee, the following order of preference should prevail:

1. residuary legatees or devisees in trust;
2. residuary legatees or devisees for life;
3. ultimate residuary legatees or devisees, or, where the residue is not wholly disposed of, the persons entitled upon an intestacy;
4. estate trustees of persons indicated in 3;
5. legatees or devisees, or creditors;
6. contingent residuary legatees or devisees, or contingent legatees or devisees or persons having no interest in the estate, who would have been entitled to a grant had the deceased died wholly intestate;
7. the Crown.

10. Where, in the case of intestacy, it is necessary for the court to appoint an estate trustee, the following order of preference should prevail:

1. spouse;
2. children;
3. parents;
4. grandchildren;

5. brothers and sisters;

6. great-grandchildren;

7. uncles, aunts, nephews, nieces, grandparents;

8. other collateral relatives of more remote degrees.

11. (1) For the purposes of recommendations 9 and 10, the term "spouse" should be given the expanded definition that is used in Part III of the *Family Law Act, 1986*.

(2) For the purposes of recommendations 9 and 10, the terms "child" and "parent" should be given the same definitions used in the *Family Law Act, 1986*.

(3) If the definition of "spouse", "child" or "parent" is later amended, the definition of that term for the purposes of estates administration should be changed to reflect that amendment.

12. The court should be given a discretion to decline to appoint a person as estate trustee who would otherwise be entitled under recommendations 9 and 10 where it would not be advantageous to the administration of the estate, taking into account all relevant circumstances, to appoint that person. In such circumstances, the court should be empowered to appoint another person as estate trustee.

13. Legislation should not list the circumstances that should disentitle a person from acting as an estate trustee.

14. Where an applicant for an estate trustee certificate is named in the will, the court should be given a discretion to decline to appoint that person where it would not be advantageous to the administration of the estate, taking into account all relevant circumstances, to appoint that person. In such circumstances, the court should be empowered to appoint another person as estate trustee.

15. A non-resident of Ontario should be entitled to apply for an estate trustee certificate, subject to compliance with the bonding provisions to be specified by legislation.

16. An estate trustee named in the will or a person entitled to apply to the court to be appointed estate trustee should be be entitled to renounce her right to be appointed estate trustee by an instrument in writing filed with the court.

17. An estate trustee named in the will or a person entitled to apply to the court to be appointed estate trustee should be entitled to accept appointment as estate trustee, while at the same time she should be entitled to renounce her rights with respect to the administration of

any estates to which she might have been entitled because the deceased was an estate trustee.

18. A person named in a will or a person entitled to apply to the court to be appointed estate trustee should be entitled to renounce her right to be appointed estate trustee, notwithstanding the fact that she has intermeddled in the administration of the estate. The person, however, should remain liable for any loss caused by her intermeddling.

19. A minor who is named estate trustee in the will or who is a person entitled to apply to the court to be appointed estate trustee should be entitled to renounce the right to be appointed estate trustee by instrument in writing executed by a guardian of the property of the minor appointed under the *Children's Law Reform Act* or by the Official Guardian.

20. Retraction of a renunciation should be permitted at any time, subject to the approval of the court.

21. The recommendations in the Ontario Law Reform Commission's *Report on the Law of Trusts* governing non-judicial appointment of trustees should apply to estate trustees.

Powers and Duties of the Estate Trustee

Duty to Dispose of the Body of the Deceased

22. (1) Subject to paragraphs (2) and (3), the duty to dispose of the deceased's body should fall upon the estate trustee.

(2) If no estate trustee has been named in the will or appointed by the court, or if the estate trustee is unavailable or unwilling to act, the family members should have the duty to dispose of the body of the deceased in accordance with the following order of preference:

1. the surviving spouse with whom the deceased was living at the time of death;
2. children of the deceased of the age of eighteen years or older;
3. the parents of the deceased person;
4. the brothers and sisters, of full or half blood, of the deceased of the age of eighteen years or older.

(3) The terms "spouse", "child" and "parent" should be defined in accordance with recommendation 11.

23. (1) Directions by the deceased should be binding on the person with the duty of disposal, in accordance with paragraphs (2) and (3).

(2) The directions of a deceased regarding disposal of her body should be binding on the person under a duty to dispose of the body only if set out in the will or any document dictated or signed by the testator.

(3) There should be a duty on the estate trustee or any person under a duty to dispose of the body of the deceased to make reasonable efforts to ascertain whether the deceased left binding directions concerning disposal of her body.

(4) If the deceased has left no binding directions concerning disposal, or if her directions cannot be located within a reasonable time of death, the estate trustee should be required to dispose of the body of the deceased in accordance with the directions of the members of the deceased's family, according to the following order of preference:

1. the surviving spouse with whom the deceased was living at the time of death;

2. where there is no surviving spouse, or the spouse does not give a direction within a reasonable time, then a child of the deceased of the age of eighteen years or older, or if there is more than one, the majority of the children of the deceased of the age of eighteen years or older;

3. if a majority cannot agree within a reasonable time, a parent or parents of the deceased person;

4. if there is no surviving parent, or there is no direction from the parent or parents within a reasonable time, a brother or sister, of full or half blood, of the deceased of the age of eighteen years or older, or if there is more than one, a majority of them.

(5) The terms "spouse", "child" and "parent" should be defined in accordance with recommendation 11.

(6) The estate trustee should make reasonable efforts to locate the family members to ascertain their directions.

(7) Where the deceased has left no will, or the will cannot be located within a reasonable time after the death of the deceased, or if the will has made no provision for the disposal of the body of the deceased, and the estate trustee, after reasonable inquiry, cannot locate the family members or has received no binding directions from them within a reasonable time, the estate trustee should have the right to decide the details of disposal of the body of the deceased.

(8) A direction made pursuant to the above recommendations, whether by will or other document, or by a person given the right

to give such a direction, should be binding on a person with the duty to dispose of the body unless it is not financially reasonable in the circumstances.

24. "Disposal of the body" should be defined to mean any lawful disposal of a body that may be made under Ontario law.

Duty to Maintain Records and Provide Information

25. Estate trustees should be under a statutory duty to keep accounts.

26. Estate assets should be listed in a complete inventory, which should be kept current.

27. Where a person who comes within the definition of "dependant" in Part V of the *Succession Law Reform Act* applies to the court for access to the accounts, including the inventory, the inventory should include the transactions listed in section 72 of the *Succession Law Reform Act* (see recommendation 31(1)). An estate trustee who is ordered to provide an inventory should be required to list only those transactions that can be ascertained with reasonable effort.

28. Beneficiaries should have a right of inspection, exercisable on reasonable notice, of the accounts, including the inventory, and all books and records. Beneficiaries should also have a right, exercisable on reasonable notice, to obtain a copy of the accounts, books and records at their own expense.

29. (1) Legislation should provide a summary procedure for a beneficiary to apply to the court if the estate trustee fails to afford access in accordance with recommendation 28.

(2) Where a beneficiary uses the summary procedure to obtain an order for disclosure, and the court orders that costs are to be awarded to the beneficiary, the court should be empowered to order that the costs be paid by the estate trustee personally.

30. An estate trustee should be liable in damages to the beneficiary for any loss caused by a failure to comply with the statutory provisions respecting the maintenance of, and access to, accounts, books and records.

31. (1) A person coming within the definition of "dependant" in Part V of the *Succession Law Reform Act* or a creditor whose claim has not been paid in full or in a timely fashion should be entitled to apply to the court for an order giving her such access to accounts, books and records as she can demonstrate should reasonably be made available. The court should be empowered to limit disclosure to such matters as it thinks fit.

(2) Where an estate trustee fails to afford access to a creditor in compliance with a court order, forcing a further application by that creditor, if the court orders that costs are to be awarded to the creditor, costs are to be payable by the estate trustee personally. An estate trustee should be liable in damages to the creditor for a loss caused by a failure to comply with the court order for access. These recommendations should apply to persons coming within the definition of "dependant" in Part V of the *Succession Law Reform Act*.

32. A testator should not be entitled to relieve an estate trustee of the duties respecting the maintenance of, and access to, accounts, books, and records, imposed upon her by legislation and the general law. However, a testator should be entitled to impose obligations by will that exceed those imposed by legislation and the general law, and the estate trustee should be required to comply with these duties unless the court modifies or relieves her of them.

33. Legislation should establish a summary procedure for beneficiaries, creditors whose claims have not been paid in full or in a timely fashion, and persons coming within the definition of "dependant" in Part V of the *Succession Law Reform Act*. This procedure should allow them to apply to court for an order compelling the estate trustee to provide information of which she has knowledge relating to the administration of the estate where such information is not revealed in the accounts, books and records. Where an estate trustee fails to provide information in compliance with a court order, and in a further application the court orders that costs are to be awarded to the applicant, costs should be payable by the estate trustee personally. An estate trustee should be liable in damages for a loss caused to a beneficiary, creditor, or person coming within the definition of "dependant" in Part V of the *Succession Law Reform Act* by a failure to comply with the court order.

34. A statutory provision, similar to Rule 50 of the rules governing proceedings under the *Estates Act*, should be enacted to provide that where, on the application of the estate trustee, a court is satisfied that a person has knowledge or possession of any will or other document or asset relating to or belonging to an estate, the court may order that person to attend to be examined and to provide information concerning the will, document, or asset, including the transactions set out in section 72 of the *Succession Law Reform Act*. The court should be empowered to order compensation for the work involved in providing the information.

Duty to Get in the Estate

35. Estate trustees should have the powers set out in section 48(2) of the *Trustee Act*. The exercise of these powers should be made subject to the normal standard of care (see recommendation 55).

36. Legislation should state that it is the duty of the estate trustee to bring actions on behalf of the estate that may be brought under the common law or pursuant to section 38 of the present *Trustee Act*.

37. Section 39 of the present *Trustee Act*, dealing with the action of account at common law, should be repealed.

38. The appointment of a person as estate trustee should not extinguish or suspend a debt owed by that person to the deceased, in the absence of specific provision in the will forgiving the debt. An estate should be entitled to pursue its rights against an estate trustee who is a debtor.

39. (1) An estate trustee who it is claimed owed debts to the deceased and who disputes the existence or amount of such debts should not for that reason alone be required to retire as estate trustee. Subject to paragraph (2), she should have her rights determined in the same manner and by the same procedure that is available to any other debtor of the deceased.

(2) An estate trustee should not exercise any rights or duties with respect to the determination of the existence or amount of a debt owed by her to the deceased. The estate trustee's rights or duties on behalf of the estate should be asserted by any other estate trustee who is not personally involved in the subject matter of the litigation. If there is no other estate trustee, an estate trustee under a limited grant should be appointed by the court for this specific purpose. Except in relation to the debt allegedly owed to the estate by her, the estate trustee's duties and powers should not be affected. However, the court should be empowered to remove the estate trustee upon application by a fellow estate trustee or an interested party.

Duty to Pay Debts

40. Estate trustees should be given the power set out in section 48(1) of the present *Trustee Act*. The exercise of these powers should be made subject to the normal standard of care (see recommendation 55).

41. Estate trustees should have no discretion to pay a debt or allow a claim that is barred by the *Limitations Act* or any other limitations provision, in the absence of a specific direction in the will authorizing her to pay the debt or allow the claim.

42. Where the testator authorizes payment of a debt barred by the *Limitations Act* or any other limitations provision, that debt should not be paid until all the other debts of the deceased have been paid in full, but should be paid in full in priority to payments or gifts to the beneficiaries of the deceased.

43. An estate trustee should have the same right to recover a debt from the estate as any other creditor. While estate trustees should continue to have the right of retainer with respect to non-contentious debts, they should have no priority over other creditors of the estate. However, in the absence of an authorization in the will, estate trustees should not be entitled to retain for a statute-barred debt.

44. (1) Where an estate trustee claims to be owed debts by the deceased, and there is a dispute as to the existence or amount of such debt, the estate trustee should not for that reason alone be required to retire. Subject to paragraph (2), she should have her rights determined in the same manner and by the same procedure that is available to any other creditor of the deceased.

(2) An estate trustee should not exercise any rights or duties with respect to the determination of the existence or amount of a debt owed to her by the deceased. The estate trustee's rights or duties on behalf of the estate should be asserted by any other estate trustee who is not personally involved in the subject matter of the litigation. If there is no other estate trustee, an estate trustee should be appointed by the court for this specific purpose. Except in relation to the debt allegedly owed to her by the estate, the estate trustee's duties and powers should not be affected. However, the court should be empowered to remove the estate trustee upon application by a fellow estate trustee or an interested party.

Administrative and Other Powers

45. Estate trustees should be given the following powers that were proposed for ordinary trustees in the *Report on the Law of Trusts*:

1. investment;
2. leasing;
3. management, maintenance and repair;
4. insurance;
5. carrying on a business;
6. surrender of property;
7. acquisition of a dwelling home; and
8. borrowing money.

46. (1) Subject to the power of the testator to provide otherwise, estate trustees should have a general statutory power to mortgage both the real and personal property of the estate. This power should

be exercisable without notice to any person, including the Official Guardian and the Public Trustee, and it should be exercisable without any order of the court.

(2) A mortgagee from an estate trustee in good faith and for value should be entitled to hold her interest freed and discharged from any debts or liabilities of the deceased owner, except those that are specifically charged thereon otherwise than by her will, and freed and discharged from all claims of persons beneficially entitled thereto, and to hold her interest subject to the terms of the will only where the restrictions on the power of mortgaging are noted on the estate trustee certificate or where she has actual notice at the time of the mortgage that the estate trustee does not possess the power she purports to exercise, or that she is exercising the power in a manner that is contrary to that provided in the will.

(3) A mortgagee should not be bound to see to the application of the money advanced to the estate trustee.

(4) Mortgagees from an estate trustee who rely upon the production of an estate trustee certificate or a deed of discharge that contains a vesting declaration, express or implied, whether or not they otherwise have notice of the will, should be entitled to assume without inquiry that the former estate trustees and the substitute or additional trustees possessed or possess and properly exercised or are properly exercising every power that they purported or purport to exercise over the property.

(5) A mortgagee who, at the time of the mortgage from the estate trustee, has actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will, should hold her interest subject to the terms of the will, unless she has obtained her interest from a prior mortgagee without actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will.

(6) An estate trustee should be entitled to exercise her power to raise money by way of mortgage or other security for the purpose of benefiting an asset by mortgaging or giving as security an asset other than the asset to be benefited, but only with the written consent of the person entitled to the asset mortgaged or given as security. Where the mortgagee or secured lender realizes against the asset given as security for the loan, the person entitled to that asset should be entitled to recover against the asset benefited to the extent of her loss. Where the asset mortgaged or given as security is distributed to the person entitled to that asset, and that person makes payments to avoid realization

by the mortgagee or secured lender, that person should be entitled to recover against the asset benefited to the extent of the payments made.

47. Estate trustees should be given the power to do all ancillary acts or things and execute all instruments necessary or desirable to enable them to carry out effectively the intent and purpose of the powers vested in them.

48. Where, in the administration of estate property, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction is in the opinion of the court expedient, but it cannot be effected because of the absence of a power for that purpose vested in the estate trustees by the will or by law, the court should be empowered to confer upon the estate trustees, either generally or in any particular instance, the necessary power on such terms and subject to such conditions as the court thinks fit. The court should be empowered to rescind, vary, or replace any such order, but such a rescission, variation, or replacement should not affect any act or thing done in reliance upon the order before the person doing the act or thing became aware of the application to the court to rescind, vary, or replace the order.

49. The power of an estate trustee to delegate the exercise of her powers and the discharge of her duties should be identical to the power recommended for a trustee in the *Report on the Law of Trusts*.

50. (1) Where two or more estate trustees are appointed, they should have joint authority with respect to the estate of the deceased, and their duties and powers should be exercised only with the agreement of all.

(2) Where the estate trustee certificate has been granted to one or some of two or more estate trustees, whether or not power is reserved to the other or others to prove the will, any transaction may be effected and any power or authority exercised by the estate trustees named in the estate trustee certificate for the time being, and that act should be as effectual as if all persons entitled to be appointed estate trustees had concurred therein.

(3) Where it appears that the estate trustees are unable to achieve unanimity on a matter, one or more of them should be entitled to apply to the court for an order resolving the matter in any way that it considers proper.

51. Where a will authorizes a majority of estate trustees to act, the majority should also be empowered to do all acts and things and execute all instruments necessary to carry out the act.

The Professional Estate Trustee

52. Estate trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, should employ that particular level of knowledge or skill in the administration of the trust. (See recommendation 55.)

Liability

53. The requirement of pleading *plene administravit* or *plene administravit praeter* in actions brought against estate trustees, and the imposition of personal liability for a failure to make either plea, should be abolished. However, the estate trustee should be personally liable for costs unless she advises a plaintiff in writing that there are no assets or insufficient assets in the estate to satisfy the amount of the debt upon which the action is brought.

54. Estate trustees should be allowed to contract on the basis that they incur no personal liability and that the person contracting with the estate trustee should be entitled to have recourse only to the assets of the estate.

55. The nature and extent of the liability of an estate trustee for her administration of the estate should be the same as for an ordinary trustee. Where liability is premised upon a lack of care, the standard of care recommended in the *Report on the Law of Trusts* should apply to estate trustees. Accordingly, in the discharge of their duties and the exercise of their powers, whether the power or duty is created by law or by the will, estate trustees should exercise that degree of care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person. (But see recommendation 52.) The distinctions between *devastavit* and breach of trust should be abolished; the liability of the estate trustee should be determined by the latter concept.

56. The concept of executor *de son tort* should be abolished and a person who intermeddles with the estate of a deceased person should be liable under the general law for any loss caused to the estate by the intermeddling.

57. The recommendations in the *Report on the Law of Trusts* providing for relief for breach of trust should apply to estate trustees.

58. In the case of an insolvent estate, where an estate trustee pays more to a creditor or claimant than the amount to which she is entitled, the court should be empowered to relieve the estate trustee either wholly or partly from personal liability if it is satisfied that she has

acted honestly and reasonably and ought fairly to be excused for the payment.

59. Where an estate trustee holds as an asset a long-term lease, mortgage or other instrument that imposes upon the estate a liability beyond one year from the death of the deceased, and she assigns this asset to a person approved by the person to whom the estate otherwise would have been liable for the full term of the instrument, the liability of the estate trustee for further payment under the instrument should cease from the moment of the assignment. The approval of the person to whom the estate otherwise would have been liable for the full term of the instrument should not be arbitrarily withheld.

60. The recommendations made in the *Report on the Law of Trusts* in relation to clauses that purport to exonerate trustees from liability should apply to estate trustees.

Compensation and Reimbursement

61. The recommendations made in the *Report on the Law of Trusts* in relation to the entitlement to compensation of trustees, and the quantification of that compensation, should apply to estate trustees.

62. As a guide to a court in determining the "fair and reasonable compensation" to which an estate trustee is entitled under legislation, regulations should prescribe the "usual" percentages. A broadly-based committee, representing all members of the community affected by this matter, should be established to advise the Attorney General what percentages should be prescribed. Regulations should be adopted after this committee reports to the Attorney General.

63. Where the compensation of an estate trustee named in the will is fixed by the will, the estate trustee should be entitled to apply to the court for an order permitting her to waive her right to the compensation fixed by the will and to seek compensation under the court's statutory jurisdiction. The court should be empowered to allow the estate trustee to waive the compensation fixed by the will only where it appears to the court that the compensation would be unreasonable in the circumstances.

64. (1) Section 12(1) of the *Succession Law Reform Act* should be amended to read as follows:

> 12.—(1) Where a will is attested by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for the payment of debts or a provision fixing the compensation of an estate trustee to the extent that such compensation does not exceed the amount that would have been awarded by the court under its statutory jurisdiction, is thereby

given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,

(a) the person so attesting,

(b) the spouse, or

(c) a person claiming under either of them,

but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

(2) Section 12(2) of the *Succession Law Reform Act* should be amended along the same lines.

65. In order for an agreement between estate trustees and beneficiaries concerning compensation to be binding, it should be written and should be signed by the estate trustee and the beneficiaries to be bound.

66. An agreement between the estate trustee and the beneficiaries of an estate regarding compensation should not oust the jurisdiction of the court to allow compensation under its statutory jurisdiction, and the court should be empowered to consider the agreement in exercising that jurisdiction.

67. Any agreement between the deceased and an estate trustee respecting compensation should not bind the estate unless it is incorporated in the will.

68. Where there is a provision in the will fixing the compensation of the estate trustee named therein and there is a deficiency of assets, the estate trustee's compensation should be deemed to be an administrative expense and have priority over legacies and other unsecured debts, to the extent that it does not exceed what would be allowed as fair and reasonable compensation under the court's statutory jurisdiction. Any excess over that amount should be treated as a legacy, and subject to the order of application of assets to meet liabilities. Subject to section 68 of the *Succession Law Reform Act*, the excess should be paid in priority to other legacies.

69. The Public Trustee should be compensated for acting as an estate trustee on the same basis as private estate trustees, and the five per cent maximum commission for services, set out in section 13 of the *Crown Administration of Estates Act*, should be abolished.

70. Estate trustees should be entitled to reimburse themselves or pay or discharge out of estate property all expenses incurred in or about the administration of the estate.

71. If one or more of several estate trustees enter into a contract or exercise an authority or power without the concurrence of the other estate trustees, such one or more estate trustees should not be entitled to

reimbursement from estate assets for sums expended unless the act is subsequently ratified by all the estate trustees.

Suspension and Termination of the Office

72. The concept of the suspension of the office of estate trustee should be abolished and, in the case of incapacity, the estate trustee should be subject to the same rules as an ordinary trustee.

73. The recommendations for the retirement of trustees in the *Report on the Law of Trusts* should apply to estate trustees, provided that such retirement should not be effective until after registration of a notice of retirement in a form prescribed by regulation and surrender of the estate trustee certificate in the office of the Ontario Court (General Division) from which the estate trustee certificate issued to the retiring estate trustee. Surrender of the estate trustee certificate should be solely for the purpose of revoking the designation of the estate trustee.

74. The recommendations in the *Report on the Law of Trusts* governing the non-judicial and judicial removal of trustees should apply to estate trustees.

CHAPTER 3: THE BENEFICIARY

75. Section 55 of the *Succession Law Reform Act* should be amended to read as follows:

> 55.—(1) Unless otherwise provided by will, where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, or within seven days of each other, the property of each person, or any property of which such person is competent to dispose, shall be disposed of as if that person had survived the other or others.
>
> (2) Unless a contrary intention appears, where two or more persons hold legal or equitable title to property as joint tenants, or with respect to a joint account, with each other, and all of them die in circumstances rendering it uncertain which of them survived the other or others, or within seven days of each other, each person shall be deemed, for the purposes of subsection (1), to have held as tenant in common with the other or with each of the others in that property.
>
> (3) Where a will contains a provision for a substitute estate trustee operative if an estate trustee designated in the will,
>
> (a) dies before the testator;
>
> (b) dies at the same time as the testator; or
>
> (c) dies in circumstances rendering it uncertain which of them survived the other,

and the designated estate trustee dies in circumstances rendering it uncertain which of them survived the other or others, or within seven days of each other, then, for the purpose of probate, the case for which the will provides shall be deemed to have occurred.

(4) The proceeds of a policy of insurance shall be paid in accordance with sections 192 and 272 of the *Insurance Act* and thereafter this Part applies to their disposition.

76. (1) The *Uniform Presumption of Death Act*, proposed by the Uniform Law Conference of Canada, should be enacted, subject to the changes set out in paragraphs (2)-(5).

(2) The court should be empowered to state the date upon which the absent person is presumed to have died or to state the date after which the person is presumed not to be living.

(3) Either the Public Trustee or, where the court considers it more appropriate, a person appointed by the court, should be a party to all applications to have a person declared to be presumed dead.

(4) Where a person who is presumed to be dead returns after her property has been distributed, she should be entitled to apply to the court for the return of her property or payment of its value. The court should be required to order the return of the property, in whole or in part, or payment of its value, to the returning absentee only if that person demonstrates that it would be more equitable to return all or part of the property to her or make a payment to her.

(5) In making an order in the exercise of this power, the court should be empowered to impose such terms and conditions as is appropriate in the circumstances.

77. The provisions of the *Conveyancing and Law of Property Act*, the *Insurance Act*, the *Marriage Act*, and any other Ontario statute dealing with the presumption of death should be examined to ensure that the implementation of recommendation 76 will not cause any problems.

78. (1) The law and practice governing claims by all types of unascertained beneficiaries and next-of-kin should be governed by rules similar to those set out in section 23 of the *Estates Administration Act*, subject to the recommendations that follow.

(2) Where an estate trustee has made reasonable inquiries for beneficiaries and next-of-kin, and the entitlement of a person was not known to the estate trustee at the time of distribution, she should not be liable to that person for failing to distribute property to her.

(3) In the case of persons who are entitled by virtue of a relationship traced through a birth outside marriage, estate trustees should be

required to search the records of the Registrar General relating to parentage, and should not be liable for failing to distribute property to a person who is entitled by virtue of a relationship traced through a birth outside marriage if reasonable inquiries have been made and the search has failed to disclose the existence of that person.

(4) Section 23(3) of the *Estates Administration Act* should be repealed and replaced by a provision stating that, where a person whose existence was not ascertained prior to the distribution of the estate seeks to claim her share of the estate after it has been distributed, she should be entitled to apply to the court for the return of her share or the payment of its value. The court should be required to order the return of the share, in whole or in part, or payment of its value, to the returning absentee only if that person demonstrates that it would be more equitable to return all or part of the share to her or make a payment to her. In making an order in the exercise of this power, the court should be empowered to impose such terms and conditions as is appropriate in the circumstances.

(5) When all inquiries and advertisements have been made in accordance with the direction of the court, or approved subsequently by the court, the estate trustee should be free from personal liability for failing to distribute the estate to those persons whose existence was not revealed.

79. Section 24 of the *Estates Administration Act* should be amended to apply to both testate and intestate succession. It should provide that, where a person receives an *inter vivos* gift, which has been expressed by the donor or acknowledged by the donee to be an advance on the future inheritance of the latter, the value of the gift should be taken into account in determining her share in the estate of the donor. This rule should apply without reference to the relationship between the deceased donor and the donee.

80. For the purpose of Part V of the *Succession Law Reform Act*, the definition of "dependant" should be expanded to include a person who has rendered domestic or housekeeping services for a deceased person in the deceased's lifetime, and who has established an express or implied promise by the deceased, whether or not enforceable under the law of contract, to reward her for the services by making some testamentary provision.

81. Where the promise to give property by will is not fulfilled and the promisee is successful in damages in a contract action, the damages recovered should not be subject to an order made under Part V of the *Succession Law Reform Act*, except to the extent that the value of the property exceeds the consideration therefor.

82. (1) Any provision in a will designed to preclude or discourage an

application to the court with respect to the validity of a will should be void, whether or not it is attached to a gift of realty or personalty and whether or not it is coupled with a gift over.

(2) If the provision described in paragraph (1) is a condition precedent, the provision should be void, but the gift should not fail for that reason.

(3) There should be no change in the law respecting conditions subsequent.

83. (1) Where the court would otherwise apply the rule of public policy precluding a person who has unlawfully caused the death of another from benefiting by her act, the court should be empowered to order that the effect of the rule be modified, in whole or in part, where it is just to do so.

(2) Paragraph (1) should not apply where the person has been convicted of murder under the *Criminal Code*.

84. (1) Where, in the case of a joint bank account, one joint tenant has killed another, and the court has applied the public policy rule, described in recommendation 83(1), the joint tenant who has unlawfully caused the death should hold the whole bank account as constructive trustee, with her beneficial interest held in trust for herself and the beneficial interest of the victim held in trust for the persons entitled to share in the estate of the victim.

(2) There should be a *prima facie* presumption that the beneficial interests are equal.

(3) Where a remainderman has unlawfully caused the death of a life tenant, and the court has applied the public policy rule, the person who has caused the death should hold on constructive trust for the estate of the life tenant an interest in the property for a period of time equivalent to the victim's projected life span, calculated according to generally accepted actuarial principles.

85. Where a court determines that a person has benefited from the death of a deceased in circumstances that would have disentitled any other person who contributed to the death of the deceased from receiving or retaining a proprietary interest arising as a result of the death, the court, notwithstanding the absence of wrongdoing on the part of the person benefited, should be empowered to impose a constructive trust on the benefit so received in favour of the estate of the deceased or such persons whom it considers proper, including the person so benefited.

86. The "moral obligation" exception to the doctrine of lapse should be abolished.

CHAPTER 4: CREDITORS AND OTHER CLAIMANTS

Insolvent Estates

87. The present parallel systems providing for the administration of insolvent decedents' estates, under the federal *Bankruptcy Act*, the provincial *Trustee Act*, and the rules of court (proceedings for administration of an estate), should be retained.

88. Representations should be made to the Government of Canada to review the *Bankruptcy Act* from the perspective of estate administration, to ensure its utility in estate administration procedures.

89. Representations should be made to the Government of Canada to amend the *Bankruptcy Act* to provide explicit discretion to the bankruptcy judge to dismiss a petition for a receiving order, or annul a bankruptcy, if, in her opinion, alternative legislation for the administration of the estate would provide a more efficient or less expensive procedure.

90. Subject to recommendation 92, the present provisions contained in the *Trustee Act* respecting the administration of insolvent decedent estates should be retained.

91. (1) Expenses for the disposal of the body of the deceased should constitute a charge on the unencumbered portion of the assets of the estate of the deceased, ranking in priority to the charges described in paragraph (2), to the extent that such disposal expenses were reasonable in the circumstances. Disposal expenses should include, among other things, funeral expenses, transportation expenses, casket, cemetery charges and a marker.

(2) Testamentary expenses and costs of administration should constitute a charge on the unencumbered portion of the assets of the estate of the deceased, to the extent that such expenses are reasonable in the circumstances. Such expenses should include fees associated with the obtaining of an estate trustee certificate, costs incurred in obtaining legal advice as to the administration of the estate, the costs of the estate trustees and other parties in an action for the administration of the estate, expenses incurred for the protection of the property of the estate, payments in discharge of debts falling due after the death of the deceased, and the compensation to which the estate trustee is entitled by virtue of her administration of the estate of the deceased.

92. The institution of inspectors under the *Trustee Act* should be abolished and, accordingly, sections 57(3) and 59 of the *Trustee Act* should be repealed.

93. (1) Proceedings for administration of an estate should be retained.

(2) The judge having carriage of the proceeding should have carriage of the whole proceeding, from the application for administration, through all intermediate procedures, to the final distribution of the estate.

(3) The elements of proceedings for administration of an estate by the court should be set out expressly in legislation.

Solvent Estates

94. Subject to recommendations 96 and 97, the order of application of assets to meet the liabilities of an estate should be as follows:

(a) property specifically charged with the payment of debts or left on trust for the payment of debts;

(b) property passing by way of intestacy;

(c) residuary property;

(d) general legacies and devises;

(e) specific legacies and devises;

(f) property over which the deceased had a general power of appointment that she might have exercised for her own benefit without the assent of any other person, where the property is appointed by will.

95. In the application of the order set out in recommendation 94, there should be no distinction between personalty and realty.

96. Where a will expresses an order of application of assets other than the one set out in recommendation 94, effect should be given to the directions in the will.

97. The court should have the discretion to direct an order of application of assets, other than the one set out in recommendation 94, where it is of the opinion that the order of application directed by it more closely approximates the wishes of the testator.

Specifically Encumbered Property—Locke King's Act

98. Section 32 of the *Succession Law Reform Act*, dealing with the liability of property to satisfy a mortgage debt, should be amended to apply to personal, as well as real, property.

99. A writ of seizure and sale should be excluded from the definition of "mortgage" in section 32(4) of the *Succession Law Reform Act*.

100. The court should have the discretion to order the payment of a debt secured on property in a manner other than as provided for in section 32 of the *Succession Law Reform Act* where it is of the opinion that this more closely approximates the wishes of the testator.

Notification of Claims

101. For the purpose of the proposed notification and contestation procedures, the word "claimant" should be defined to mean a person who has a claim against the estate of the deceased, whether arising prior, or subsequent, to the death of the deceased, in respect of a contract, tort, property interest in any property of the deceased, or any other cause, whether the claim is contingent or not, liquidated or unliquidated, secured or unsecured, matured or unmatured.

102. (1) The necessity of advertising for the notification of claims by creditors and other claimants should be a matter within the discretion of the estate trustee.

(2) Where an estate trustee has advertised for the notification of claims in accordance with the recommendations contained in paragraph (3), and the time for the notification of claims as set out in the advertisement has elapsed, or where the estate trustee has not advertised for the notification of claims, but six months have elapsed from the date of death of the deceased, the estate trustee should be free to pay the claims of which she then has notice and to distribute the property of the deceased to the persons entitled thereto. In these circumstances, the estate trustee should not be personally liable to any claimant of whom she did not have notice at the time of payment or distribution.

(3) For the purposes of paragraph (2), advertisements for the notification of claims

(a) should be published on two separate occasions, once per week for two consecutive weeks;

(b) should be published in a newspaper having general circulation in the locality or localities in which the deceased resided, worked, and carried on business, at the time of death;

(c) should provide a time limit for the notification of claims that is not less than four weeks from the date on which the advertisement is first published; and

(d) should contain the following:

(i) the name of the deceased;

(ii) the deceased's place or places of residence, employment, and business;

(iii) the date of death;

(iv) the name and address of the person to whom notice of claim should be given;

(v) the date by which notice of claim should be given; and

(vi) a warning that the estate trustee may distribute the assets of the estate after the date specified having regard only to the claims of which she then has notice.

(4) Section 25 of the *Estates Administration Act*, which provides that no distribution of an intestate's estate can be made until after the expiration of one year from the date of death unless the personal representative has complied with section 53 of the *Trustee Act*, should be repealed.

103. (1) Where no application for an estate trustee certificate has been made, a claimant should be entitled to file her claim with a local registrar of the Ontario Court (General Division).

(2) Upon receipt of such claim and evidence of death of the debtor, the local registrar should immediately send a copy of this material to the Estate Registrar for Ontario.

(3) The Estate Registrar for Ontario should keep a file of such claims, and should notify any local registrar when an application for an estate trustee certificate is subsequently made.

104. (1) Subject to the recommendations made in paragraphs (2) and (3), an estate trustee should be deemed to have received notification of the following:

(a) tax claims;

(b) secured claims and claims that arise by operation of statute, the existence of which can be determined by the search of a public register;

(c) writs of seizure and sale that have been filed with the sheriff;

(d) notices of garnishment that have been filed with the sheriff of the county in which the deceased resided at the time of her death; and

(e) support orders filed with the Director of Support and Custody Enforcement under the *Support and Custody Orders Enforcement Act, 1985*.

(2) An estate trustee should be deemed to have received notification of the claims set out in paragraphs (1)(b)-(e), only if such claims are registered or filed more than ten working days before a distribution of any portion of the estate.

(3) Until the adoption of a province-wide system for the filing of writs of seizure and sale, the estate trustee should be deemed to have received notification of writs filed with the sheriff only in those counties or districts in which, to the knowledge of the estate trustee, property of the estate is situated.

(4) The sheriff should be required to provide particulars, in writing, of notices of garnishment filed in her office in response to an inquiry from an estate trustee of a deceased debtor.

(5) The Director of Support and Custody Enforcement should be required to provide particulars, in writing, of support orders filed in her office in response to an inquiry from an estate trustee of a deceased debtor.

105. The type of system that now exists respecting the rights of a creditor or claimant who has failed to notify the personal representative should be retained.

Contestation of Claims

106. (1) Sections 69 and 70 of the *Estates Act* should be consolidated and amended as follows:

(a) Where a claim or demand has been made against the estate of a deceased person, the estate trustee should be permitted to serve the claimant with a notice in writing that she contests the same in whole or in part, and if in part, state what part.

(b) The notice of contestation should set out expressly the claimant's rights, as contained in paragraph (c), and the consequences for failure to take action, as contained in paragraph (e).

(c) Within thirty days after the receipt of such notice of contestation of the claim, the claimant should be permitted to

(i) commence an action against the estate for the amount of the claim in the ordinary manner and serve the estate trustee as provided in the rules of court, or

(ii) commence proceedings against the estate for the amount of the claim, in accordance with the summary claims procedure (see paragraph (g)).

(d) To commence a proceeding against the estate in accordance with the summary claims procedure, the claimant should not be required to verify a statement of her claim by affidavit.

(e) If the claimant does not proceed as provided in paragraph (c) in the time limited therefor or within such time as is allowed by the judge, she should be deemed to have abandoned her claim and it should be forever barred.

(f) If within sixty days after the estate trustee has notice of a claim she has neither contested the claim, nor paid or allowed the claim, the claimant should be permitted to commence proceedings against the estate for the amount of the claim, in accordance with the summary claims procedure.

(g) The manner of proceeding in the summary claims proceedings should be prescribed by regulation.

(h) The court should have the following powers:

(i) to extend the time for the commencement of an action or proceedings or the service thereof for a period not exceeding three months from the time of the receipt of the contestation of the claim;

(ii) to give directions for the conduct of the action;

(iii) to require the claimant to commence an action against the estate for the amount of her claim in the ordinary manner;

(iv) to dispose of any counterclaim or claim for a set-off by the estate trustee and if the counterclaim or set-off exceeds the claim to render a judgment against the claimant in the amount of the excess;

(v) to prescribe the time when the judgment may be enforced where the claim is proved, but not yet recoverable;

(vi) to fix costs and order the payment of the same; and

(vii) to give directions with respect to the enforcement of any judgment, by execution or otherwise.

(2) The necessity of serving the Official Guardian in contestation of claim proceedings should be eliminated.

(3) A judge should have the power to require notice of the contestation of claim proceeding to be given to the Official Guardian if minors are concerned or in any other case where in her discretion the ends of justice would be served by serving any or all the persons beneficially interested in the estate, including creditors, and to

permit them to participate in such proceedings on such terms as to costs as she shall determine.

(4) The judge should have the power to assess costs against the persons permitted to participate in a proceeding under paragraph (3) if in her opinion their participation in the proceedings added unnecessarily to the costs that the claimant or the estate would have otherwise borne.

Contingent Liabilities

107. Where a contingent liability of an estate exists, and there is a desire to distribute the estate, the court upon application by an interested party should be required to provide for the disposition of the claim as follows:

(a) by the valuation of the present value of the claim (taking into account any uncertainty) and immediate payment in the same manner as a matured claim;

(b) by the arrangement for the future payment or possible payment of the claim by the creating of a trust, giving a mortgage, obtaining a bond or security from the distributee or otherwise; or

(c) by the making of such other provisions for the disposition or satisfaction of the claim as shall be equitable.

Evidence in Claims Actions Against Estates

108. Section 13 of the *Evidence Act*, requiring corroboration in an action by or against estates, should be repealed.

Bonding of Estate Trustees

109. No bond should be required of a recipient of an estate trustee certificate unless,

(a) the recipient of, or all of the recipients of, an estate trustee certificate are nonresidents of the Province of Ontario;

(b) the recipient applied for an estate trustee certificate solely in her capacity as a creditor of the estate;

(c) the court has ordered the posting of a bond; or

(d) the will requires the posting of a bond.

110. Notwithstanding recommendation 109, the court should be empowered to dispense with the necessity of posting a bond in any situation where it determines that the posting of a bond is not necessary or where the beneficiaries and a majority of the creditors (by value) concur.

111. (1) Section 61(1) of the *Estates Act*, which provides that security is not required of the Government of Ontario, or any of its ministries or agencies, should be retained.

(2) Section 175(4) of the *Loan and Trust Corporations Act, 1987*, which provides that it is not necessary for certain trust corporations to give any security for the due performance of their duty as executor, administrator or trustee, unless so ordered by a court, should be retained.

112. (1) Either before or after the grant of an estate trustee certificate, any person having an interest in the administration of an estate should be entitled to apply to the court for an order requiring the posting of a bond or an additional bond by the estate trustee.

(2) Where a person who is required to post a bond fails to do so, the court should have the power to revoke the estate trustee certificate, and to make such further order as may be just in the circumstances.

113. An estate trustee, surety, or any person having an interest in the administration of the estate should be entitled to apply to the court at any time to have the amount of the bond reduced or the terms of the bond varied, or a substitution of the security granted.

114. A standard and plain language form of bond should be prescribed, the terms and conditions of which should be as follows:

(a) a guarantee given in pursuance of a bonding requirement should enure for the benefit of the beneficiaries, creditors, and other persons interested in the administration of the estate of the deceased as if contained in a contract made by the surety or sureties with every such person, and where there are two or more sureties, as if they had bound themselves jointly and severally;

(b) the bond shall be conditioned on the liability of the estate trustee to the beneficiaries, creditors and other persons interested in the administration of the estate;

(c) the amount of the bond shall be referable to the total value of the assets of the deceased;

(d) the bond shall be filed in the court;

(e) the surety shall be given notice of any proceedings to establish the liability of an estate trustee;

(f) upon a final passing of accounts or where it appears that all liabilities of the deceased have been satisfied the court may authorize the estate trustee to arrange for the cancellation of the bond; and

(g) unless upon order of the court, or with the consent of all the beneficiaries, no bond may be cancelled without notification of the beneficiaries or creditors of the estate.

EXEMPTIONS UNDER THE *EXECUTION ACT*

115. The *Execution Act* should be amended to clarify the following:

(a) after the death of the debtor, all property exempt from seizure in the hands of the deceased should remain exempt in the hands of the surviving spouse and the debtor's family, without regard to whether the claims arose prior to or subsequent to the death, or whether they were asserted against the estate trustee and not the deceased; and

(b) expenses for the disposal of the body of the deceased, testamentary expenses and costs of administration, as defined above (see recommendation 91), should have priority over the exemptions granted in the Act.

CHAPTER 5: TRANSFER OF ASSETS OF THE DECEASED

116. No distinction should be drawn between real property and personal property with respect to the vesting and the disposition of the property.

117. Subject to recommendation 119, the system of automatic vesting of real property in the persons beneficially entitled, and the ancillary system of registration of cautions, should be abolished. It should be replaced by a system under which the chain of title from the deceased would be traced by means of an estate trustee certificate and a conveyance from the person named in the estate trustee certificate, subject, where necessary, to vesting being effected by court order.

118. Subject to recommendation 119, section 48 of the *Registry Act*, providing for the registration of wills as a link in the chain of title, should be repealed.

119. Legislation implementing recommendations 117 and 118 should not affect the vesting of property that occurred before its coming into force. In addition, persons whose interests in property vested before that date should continue to be entitled to use the existing provisions of the *Registry Act* to register wills with the same effect as under the present law.

120. Where an estate trustee is appointed by will, the property of the deceased should continue to vest in her immediately upon the death of the deceased.

121. Where there is an intestacy, no estate trustee is named in the will, or

the named estate trustee is unable or unwilling to accept her office, the property of the deceased should continue to vest in the person receiving the grant, upon the grant of an estate trustee certificate.

122. To cover the gap in title between the death of the deceased and the grant of an estate trustee certificate where the property has not vested automatically in an estate trustee named in the will, the property of the deceased should vest in the Estate Registrar for Ontario.

123. Legislation should confirm that property vests in two or more estate trustees as joint tenants.

124. (1) Subject to paragraph (2), estate trustees should have a general statutory power to sell both the real and personal property of the estate, whether for the purpose of payment of debts or for the purpose of distribution. This power should be exercisable without notice to any person, including the Official Guardian and the Public Trustee; moreover, it should be exercisable without any order of the court.

(2) An estate trustee's statutory power of sale should be subject to any restrictions provided by the will.

125. A person purchasing property from an estate trustee in good faith and for value should be entitled to hold it freed and discharged from any debts or liabilities of the deceased owner, except such as are specifically charged thereon otherwise than by her will, and should take freed and discharged from all claims of persons beneficially entitled thereto, and should take the property subject to the terms of the will only where

(a) the restrictions on the power of sale are noted on the estate trustee certificate; or

(b) where she has actual notice at the time of the purchase that the estate trustee does not possess the power she purports to exercise, or that she is exercising the power in a manner that is contrary to that provided in the will.

126. A purchaser from the estate trustee should not be bound to see to the application of the proceeds of the sale.

127. Purchasers from an estate trustee who rely upon the production of an estate trustee certificate or a deed of discharge that contains a vesting declaration, express or implied, whether or not they otherwise have notice of the will, should be entitled to assume without inquiry that the former estate trustees and the substitute or additional estate trustees possessed or possess and properly exercised or are properly exercising every power that they purported or purport to exercise over the property.

128. A purchaser who, at the time of the purchase from the estate trustee, has actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will, should take the property subject to the terms of the will, unless title to the property has been held by a prior purchaser without actual notice that the estate trustee does not possess the power she purports to exercise, or that she is exercising a power in a manner that is contrary to that provided in the will.

129. (1) After paying debts and taxes, administration, testamentary and funeral expenses, and legacies, estate trustees should be required to convert the residue of the estate and pay the shares of the residuary beneficiaries in cash. This general rule should apply both to intestate and testate succession.

(2) The rule set out in paragraph (1) should be subject to a contrary provision in the will and the exercise of the power of appropriation that is proposed in recommendation 130. In addition, where the estate is solvent, and all the beneficiaries have legal capacity and agree that a distribution in kind should be made, the estate trustees should be required to make such distribution.

130. Estate trustees should be entitled to appropriate real or personal property in kind in or towards satisfaction of the share of any beneficiary, with the consent of that beneficiary. For the purpose of the appropriation, following consultation with a qualified person where the estate trustees are not personally qualified, the estate trustees should place a valuation on the property. However, no specific gift made by the will should be adversely affected by an appropriation of property in kind. In addition, within one month of the valuation or such further time as the court authorizes, the estate trustees, beneficiaries or any other interested person should be entitled to apply to the court for a review of the appropriation or the valuation and, following such notice as the court may order, the court should confirm the appropriation or the valuation or make such variation as it considers proper.

131. Where a beneficiary of an estate is entitled to any specific real or personal property, whether because of the exercise of the power of appropriation set out in recommendation 130 or otherwise, the estate trustee should be entitled to transfer in kind to such person the property to which she is entitled. Legislation should make it clear that title can be transferred from an estate trustee to a beneficiary only by the form of transfer appropriate to the property that is the subject of the distribution. (With respect to personalty, see recommendation 134.)

132. The remedy of an aggrieved creditor or beneficiary for an improper exercise of the power of making appropriations or making distributions in kind should be only against the estate trustee, and the creditor or beneficiary should have no statutory claim against the beneficiary to

whom the distribution was made, against the property distributed or against any transferee from the beneficiary. However, a beneficiary who at the time of the appropriation or distribution in kind had actual notice that the estate trustee was exercising the power improperly should not be entitled to this protection.

133. Subject to a contrary provision in the will and subject to a court order, a beneficiary who is absolutely entitled in possession to a share of property, whether land or pure personalty, and whether or not such property is subject to a trust for sale, should be entitled to require that her share be distributed to her even though other shares in the property remain settled and are not yet distributable.

134. A standard form of transmission, transfer or assignment of personalty from the name of the deceased to the estate trustees and in turn from the estate trustees to the ultimate transferee should be appended to legislation. This form should identify the deceased, the estate trustees, the property being transferred, and the transferee; the form should also refer to the estate trustee certificate.

CHAPTER 6: ESTATE PROCEEDINGS

135. (1) Section 26(1) of the *Estates Act* should be amended to read as follows:

> 26.–(1) An application for an estate trustee certificate shall be made to the Ontario Court (General Division) and shall be filed in the office for the county or district in which the testator or intestate resided at the time of death.

(2) Section 26(2) and (3) should be retained.

(3) Notwithstanding paragraphs (1) and (2), the court on motion by any party should be empowered to order that an application for an estate trustee certificate may be filed in an office for another county or district where the balance of convenience substantially favours it.

(4) In contentious proceedings under the *Estates Act*, the court on motion by any party should be empowered to order that the proceedings be held at the place other than the county or district in which the estate trustee certificate is filed where it is satisfied that the balance of convenience substantially favours holding the proceedings at another place or it is likely that a fair trial cannot be had in the county or district in which the estate trustee certificate is filed.

136. (1) In all cases where it appears to the court to be necessary for the

grant of an estate trustee certificate, the inventory and preservation of the assets of the estate of the deceased, distribution of assets, or the management of the estate, the court should be empowered, upon motion, to require any person to do or to refrain from doing any act, either unconditionally or upon such terms or conditions as the court deems just.

(2) An application for the court to exercise the power proposed in paragraph (1) may be brought by the estate trustee, any person who appears to have an interest in the estate, or a "dependant" of the deceased as defined in Part V of the *Succession Law Reform Act*.

137. The rules of court should provide that, where the court determines that notice of the proceedings is necessary for the proper disposition of any matter before it, the court should be empowered to order that notice shall be given to any person, including the Official Guardian or the Public Trustee.

138. (1) The wills depository function should be continued in the local offices of the Ontario Court (General Division).

(2) The local registrar should be required to give notice of the deposit of a will to the Estate Registrar for Ontario.

(3) Extensive publicity should be given to the depository function of the court.

139. (1) Subject to the prior consent of the testator, any person or institution having original wills in her or its possession should be authorized to deposit the wills with the local registrar.

(2) Notwithstanding paragraph (1), a solicitor retiring from practice, the estate trustee of a deceased solicitor, a trust company that has ceased to have an office in the province or that has ceased to be an approved trust company, or a liquidator or receiver of a trust company, should be entitled to deposit with the local registrar for safekeeping any will in her or its custody, without specific authority from the testator, and the local registrar should be required to accept for safekeeping any will tendered to her for that purpose.

140. The fundamental character of the passing of accounts procedure should not be altered. The responsibility for scrutiny of an estate trustee's accounts and administration should remain with the individuals interested in the estate.

141. A new procedure for the "filing of accounts" should be enacted, as described below:

1. An estate trustee and an interested person is entitled to a passing of accounts only after the accounts have been filed in accordance with the following procedure.

2. An estate trustee may file her accounts voluntarily with the local registrar of the Ontario Court (General Division) or she may be required to file the accounts upon the application to the court of an interested person. The estate trustee must file the accounts, verified by affidavit, a copy of the estate trustee certificate, and a copy of the previous order, if any, made on a filing or passing of accounts in the estate.

3. Upon filing the accounts, the estate trustee must give notice of the filing to the persons entitled to receive notice of a passing of accounts under section 74(7) of the *Estates Act*. Where the person entitled to notice is a person under a disability, notice should be given to either the Official Guardian or the Public Trustee, as required under the *Estates Act*. The form of the notice and the method of service should be prescribed by regulation. At a minimum, the notice must be accompanied by a copy of the accounts and a schedule of the compensation claimed and any claim for costs. The notice should advise recipients that, if no interested person gives notice that she requires that the accounts be passed before a judge within 45 days of the date of filing, the accounts and draft order approving them will be presented by the local registrar to a judge for approval as an unopposed application. A person who has received notice of the filing is entitled to require a passing of accounts within 45 days of the date of the filing. The form of the notice requiring a passing of accounts should be prescribed by regulation.

4. Notwithstanding paragraph 3, the court, upon application, may give directions with respect to service of the notice of filing, and may dispense with service of the notice of filing or the copy of the accounts, or both. Where the court dispenses with the service of the copy of the accounts, a person who is entitled to notice of the filing, or her solicitor, is entitled to examine the accounts at the office of the local registrar.

5. Upon filing proof of service, and, where a person under a disability is entitled to notice, a certificate of the Official Guardian or Public Trustee stating that the accounts have been examined and there is no objection, the estate trustee may apply, after 45 days from the date of filing, to a judge, without notice, for an order approving the accounts as filed, provided that there is no notice requiring the judge to pass the accounts.

142. (1) Section 33(1) of the *Estates Act* should be amended to state that an appeal by any party or person taking part in a proceeding under this Act from an order, determination or judgment of the Ontario

Court (General Division) is governed by the *Courts of Justice Act, 1984*.

(2) Section 77 of the *Succession Law Reform Act* should be amended to state that an appeal from an order of the court made under Part V of the *Succession Law Reform Act* is governed by the *Courts of Justice Act, 1984*.

143. Appendix C to the rules governing proceedings under the *Estates Act* should be amended so that fees in relation to matters comprehended by the *Estates Act* are set in the same manner as for other proceedings in the Ontario Court (General Division).

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